



Unilateral pollution control in the Northwest Passage

The Canadian NORDREG regulations in the context of
UNCLOS, Article 234

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Abbreviations

ACIA	Arctic Climate Impact Assessment
AEPS	Arctic Environmental Protection Strategy
AMAP	Arctic Monitoring and Assessment Programme (Arctic Council working group)
AMSA	Arctic Marine Shipping Assessment
ASPPR	Arctic Shipping Pollution Prevention Regulations (Canada)
AWPPA	Arctic Waters Pollution Prevention Act (Canada)
AWPPR	Arctic Waters Pollution Prevention Regulations (Canada)
BIMCO	Baltic and International Maritime Council
CDEM	Construction, design, equipment and manning
EC	European Community
EEZ	Exclusive Economic Zone
EU	European Union
GAIRAS	Generally accepted international rules and standards
IALA	International Association of Marine Aids to Navigation and Lighthouse Authorities
IASC	International Arctic Science Committee
ICJ	International Court of Justice
IHO	International Hydrographic Organization
ILC	International Law Commission
IMO	International Maritime Organization
INTERTANKO	International Association of Independent Tanker Owners
IPCC	Intergovernmental Panel on Climate Change
ITLOS	International Tribunal for the Law of the Sea
MSC	Maritime Safety Committee (IMO)
NATO	North Atlantic Treaty Organisation
NAV	Sub-Committee on Safety of Navigation (IMO)
NEP	Northeast Passage
Nm	Nautical mile
NORAD	North American Aerospace Defense Command
NORDREG	Northern Canada Vessel Traffic Services Zone Regulations
NSR	Northern Sea Route
NWP	Northwest Passage

SOLAS	International Convention for the Safety of Life at Sea
SRS	Ship reporting system
TOS	Traffic organization service
TSC	Convention on the Territorial Sea and the Contiguous Zone
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
USARC	US Arctic Research Commission
Vienna Convention	Vienna Convention on the Law of Treaties
VTS	Vessel Traffic Service

1. Chapter I – Introduction

1.1. Introduction

The unequivocal warming of the global climate system, primarily due to increased emissions of carbon dioxide, has to be considered as an undeniable fact of today's world. The effects of climate change are particularly severe in the Earth's polar regions. The average Arctic temperature has increased at almost twice the global average rate in the past 100 years.¹ A recent report, conducted by the Arctic Monitoring and Assessment Programme (AMAP), the Arctic Council's working group for environmental monitoring, has highlighted the past six years (2005-2010) as the warmest period ever recorded in the Arctic.² The observed reduction in snow and ice extent is consistent with Arctic warming. Modelled projections, reported by the Intergovernmental Panel on Climate Change (IPCC), predicted a decrease in sea ice in both the Arctic and Antarctic under all performed scenarios.³ One extreme model, mentioned by the Arctic Climate Impact Assessment report (ACIA), projects near total melting of Arctic sea ice by the end of the 21st century.⁴ Yet the decline in sea-ice extent is considerably faster than projected by the IPCC in 2007, with record low levels of persisting sea ice in summer every year since 2001.⁵

Climate change and its dangerous effects will lead to unprecedented changes and serious threats to the Arctic region, posing significant economic, ecological and social challenges and risks. The policy and legal implications as a consequence thereof, can be enormous as the environmental changes open up increased potentials for shipping, fishing, oil and gas exploration and tourism.

The Arctic has already become an area of serious economic opportunity, amidst of which the prospective establishment of new international maritime trade routes stands out.⁶ Both the Northwest Passage (NWP) and the Northern Sea Route (NSR) have the potential to significantly influence global shipping.⁷

¹ Intergovernmental Panel on Climate Change, IPCC 2007, p. 30

² Arctic Monitoring and Assessment Programme AMAP 2011, p. 4

³ Intergovernmental Panel on Climate Change, IPCC 2007, p. 46

⁴ Arctic Climate Impact Assessment ACIA 2005, p. 3

⁵ Arctic Monitoring and Assessment Programme AMAP 2011, p. 6

⁶ Chircop 2009, p. 355 and 356

⁷ Yet views differ on the extent of a possible impact on international shipping. From today's perspective it is less likely that the NWP will develop into a full international commercial shipping route and remain difficult for large-scale commercial shipping.

1.2. Objective of the thesis

The objective of this thesis is to exemplify the problematic nature of the NWP in the light of jurisdictional disputes regarding the safety of navigation, the related protection of the sensitive Arctic marine environment and the international legal status of the concerned waters.

To safeguard the Canadian Arctic marine environment, Canada established an Arctic marine traffic system, known as the Northern Canada Vessel Traffic Services Zone Regulations (NORDREG). These mandatory regulations, which replace the informal NORDREG Zone and its voluntary reporting system, require most non-governmental vessels to report information prior to entering, while operating within and upon exiting Canada's northern/Arctic waters. The NORDREG regulations also cover the various routes that together are considered the jurisdictionally disputed NWP. Canada claims that the waters in the Canadian Arctic Archipelago are historic internal waters (through which no passage right exists under international law), whereas the US considers these waters an international strait (with the right of transit passage). Subsequently, NORDREG and its mandatory nature came with a jurisdictionally and politically disputed baggage.

Furthermore, Canada asserts that the traffic system is consistent with international law concerning ice-covered areas, in particular with the "Arctic Exception" of the United Nations Convention on the Law of the Sea (UNCLOS)⁸, Article 234. This Article stipulates the right of coastal states to adopt laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas. Canada takes the view that the Article provides a complete legal justification under international law. Thus it is under no obligation to consult the International Maritime Organization (IMO) for approval of the NORDREG system.

⁸ See United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982

Based on these sets of problems the thesis is aimed at discussing the following research questions:

- Are the NORDREG regulations consistent with UNCLOS, Article 234, in particular the need to be a law or regulation for the prevention, reduction and control of marine pollution from vessels in ice-covered areas?
- Does the current disputed legal status of the NWP under international law lead to further problems with regard to the NORDREG regulations?
- Unilateralism vs. Multilateralism: what is the political reasoning of the involved states arguing with regard to a legal or non-legal applicability of the NORDREG regulations with Article 234?

A master thesis dealing with the NWP would be considered scientifically incomplete if it would not address the jurisdictional dispute regarding the status of the concerned waters under international law. Nevertheless and due to the limited scope of the thesis, the legal dispute between Canada and the US (in particular, the legal approach of historic internal waters vs. international strait) cannot be elaborated entirely. Yet the main arguments have been introduced. In order to expand the thesis from a purely legal one to a multi-disciplinary one, it aims to outline the possible relationship between the prevailing disagreement on the legal status of the NWP and the NORDREG dispute, contended in particular in the institutional arena of the IMO.

1.3. Legal sources and methodology

In consideration of the outlined objective of the thesis, a dual scientific approach, allowing for a link between law and political science, has to be regarded as academically fruitful. The two disciplines have too long been contemplated as separate domains of international relations, both considered as realms of action with their own distinctive rationalities and consequences.⁹ Today's complex entanglement of politics and law, especially in international relations, supersedes this anachronistic perspective.

Yet the legal approach has to be considered as the primary task. The methodological focus will incorporate both the method of analyzing international and national legal sources, as defined by Article 38 of the Statute of the International

⁹ Reus-Smit 2004, p. 1

Court of Justice (ICJ), as well as the method of interpretation of treaties, set out in Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention).¹⁰ Additionally, Article 32 of the Vienna Convention has to be contemplated with due regard to the *travaux préparatoires* of UNCLOS and its Article 234.

International law can be described as a set of binding legal norms, regulating the relationship between states. A prerequisite and fundamental rule of international law is, however, that treaties are only legally binding on states that have consented to be bound to them.¹¹ Yet Article 38, paragraph 1(b) of the Statute of the ICJ defines international custom as a primary source of international law, resulting from a general practice of states. Provisions of treaties can be internationally legally binding on states as a result of customary international law and the preceded wide-scale of practice of states.¹² In this regard, the requirement of *opinio juris*, which establishes the legally binding character of state practice in customary international law, must be given in addition.¹³

State practice is a flexible term that includes the national impacts for the formation of a rule of customary international law, originating in both a collective and individual sphere.¹⁴ Individual (unilateral) state practice can include legislation enacted by national parliaments, the actual enforcement of such legislation by national authorities, domestic court decisions, government statements or diplomatic correspondence.¹⁵ Bi- and multilateral conventions or adopted resolutions by “competent international organizations” (e.g. IMO) characterize relevant collective state practice.¹⁶ State practice can have a legal impact on UNCLOS, as it could be used as an element of interpreting the Convention, giving rise to a new rule of customary international law or concluding possible legal consequences considering inconsistent state practice.¹⁷

Additionally, secondary literature and policy documents have been used in order to substantiate the legal argumentation. In this regard a source-critical approach seems to be inevitable.

¹⁰ Vienna Convention on the Law of Treaties, 23 May 1969; see also McRae/Goundrey 1982, p. 215 and 216. The two authors critically describe a contrast between the ordinary meaning of Article 234 and the meaning in the light of its context, object and purpose.

¹¹ McDorman 2009, p. 22

¹² Ibid., p. 24

¹³ Birnie/Boyle/Redgwell 2009, p. 16

¹⁴ Molenaar 1998, p. 4

¹⁵ Churchill 2005, p. 92

¹⁶ Molenaar 1998, p. 4

¹⁷ Churchill 2005, p. 93

1.4. Structure of the thesis

The thesis is separated in two parts, with Part I focusing on the legal perspective (research questions 1 and 2) and Part II concentrating on the political point of view (research question 3). Part I is further divided in chapters and sub-chapters. Chapter II is considered a necessary first step to introduce the area concerned. It will highlight the current status and potential trends of navigation in the Arctic and the Canadian Arctic in particular, outline the occurring legal framework and further touch upon the prospective evolution of the Arctic into an area of cooperation or conflict. Based on the introduction regarding the legal framework, Chapter III, IV and V will focus in particular on the possible legal consistency of UNCLOS, Article 234 and the NORDREG regulations and the already occurring jurisdictional baggage of the NWP. Hence Chapter III will introduce the international legal framework, dealing with UNCLOS, the history of origins of Article 234 and the controversial legal status of the NWP. Chapter IV will outline the Canadian legal framework, in particular the Arctic Waters Pollution Prevention Act (AWPPA)¹⁸ and the NORDREG regulations. Furthermore Chapter V will analyze the conclusions of both the precedent chapters and find an answer to the above-mentioned possible legal applicability.

¹⁸ The AWPPA, see AWPPA (R.S.C., 1985, c. A-12), has two key regulations, namely, the Arctic Shipping Pollution Prevention Regulations (ASPPR), see ASPPR (C.R.C., c. 353) and the Arctic Waters Pollution Prevention Regulations (AWPPR), see AWPPR (C.R.C., c. 354)

PART I

2. Chapter II – The Arctic, trends of navigation and international law

2.1. The Arctic Marine Area

The commonly discussed nexus between Arctic shipping and the impacts of climate change are to some extent misleading as they transfigure the nature of navigation in the Arctic region into a new phenomenon. Shipping in the Arctic waters already exists to support hydrocarbon and mineral resource production and the supply of the local, largely indigenous, population.¹⁹ Yet both the NWP and NSR are tempting for international shipping, as the passages would considerably reduce the sailing distance between the North Pacific and the North Atlantic.²⁰ The changing climatic and environmental circumstances have to be regarded as a triggering effect with respect to navigational developments. Increasing regional and coastal marine transport and the steady growth of the Arctic marine tourism industry will have a lasting, most likely negative, effect on the Arctic marine environment and the indigenous population inhabiting the Arctic and its coastal areas and further lead to a formative globalization of the area.²¹

Both the International Hydrographic Organization (IHO) and the IMO recognize the Arctic Ocean as one of the five major components of the world ocean.²² Although the Declaration on the Establishment of the Arctic Council (*Ottawa Declaration*)²³ enumerates eight Arctic States²⁴, it is generally accepted that the Arctic Ocean is only encompassed by five coastal states, namely Canada, Denmark (in relation to Greenland), Norway, the Russian Federation and the United States.²⁵

For the purpose of this thesis and with due regard to a lacking universally accepted definition for the spatial scope of the marine Arctic, Arctic waters will be categorized according to the definition of the non-legally binding IMO Guidelines for Ships Operating in Polar Waters, paragraph G-3.3²⁶ (see *Figure 1*).

¹⁹ Chircop 2009, p. 355

²⁰ Moe/Jensen 2010, p. 4

²¹ Arctic Marine Shipping Assessment AMSA 2009, p. 8

²² *Ibid.*, p. 16. However, there is no universally accepted definition for the Arctic Ocean, as it is also defined as one of the Mediterranean seas of the Atlantic Ocean, see Tomczak/Godfrey 2001, p. 83

²³ The Declaration on Establishment of the Arctic Council (The Ottawa Declaration) 1996

²⁴ Canada, Denmark (in relation to Greenland), Finland, Iceland, Norway, the Russian Federation, Sweden and the US

²⁵ The Ilulissat Declaration 2008

²⁶ IMO Guidelines for Ships Operating in Polar Waters adopted by IMO Assembly Resolution A.1024(26), 2 December 2009, p. 7

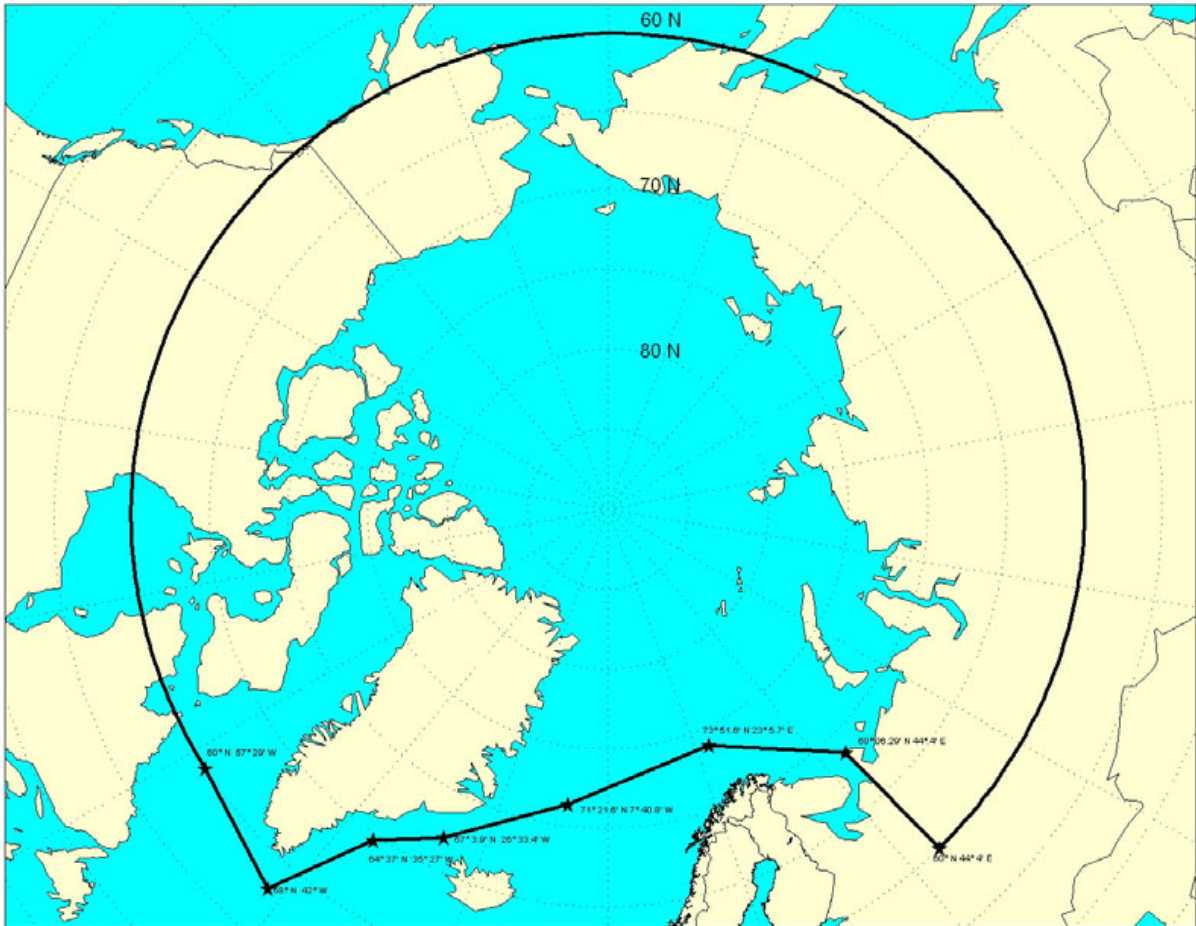


Figure 1 – Maximum extent of Arctic waters application

Source: IMO Guidelines for Ships Operation in Polar Waters 2009, p. 9

2.2. The Canadian Arctic and the Northwest Passage

The Canadian Arctic Archipelago²⁷, lying north of mainland Canada, covers about 1.400.000 km² and consists of 36.563 islands.²⁸ The Archipelago's various islands, e.g. Baffin Island, Victoria Island, Ellesmere Island, are separated by a series of channels, which together form the NWP.²⁹ The Canadian Arctic Archipelago's marine area is covered by pack ice for several months of the year, with fundamental reductions in the southern and eastern regions due to the above-mentioned impacts of global climate change. Yet summer-months ice conditions will continue to vary greatly from season to season.

The NWP is seen as a potential deepwater shortcut for shipping between the Atlantic and Pacific Ocean, with minimal usage at present due to heavy multiyear

²⁷ The term "Canadian Arctic Archipelago" refers to the geographical meaning. It is not considered an archipelago in a legal sense, as it does not meet the criteria set forth in UNCLOS, Part IV.

²⁸ The Canadian Encyclopedia 2011

²⁹ See Annex1 for an overview of the Canadian Territories and its adjacent waters.

ice.³⁰ A voyage from Seattle to Rotterdam would be shortened by 2.000 nautical miles³¹ (nm) or 25% compared to the current route via the Panama Canal.³² The NWP cannot be defined as one single route but a variety of east-west passages³³, which separate the islands of the Canadian Arctic Archipelago and the Canadian mainland. The first complete ship transit was conducted by the Norwegian explorer Roald Amundsen from 1903 to 1906. In 1944 the NWP had been navigated for the first time in one single season.³⁴ Due to the ice conditions, the operating season only lasts from late July to mid-October, depending on the route and year.³⁵

2.3. Current navigation and potential trends of navigation in the Arctic

Due to the remoteness of the area and its extreme climate conditions (e.g. low temperatures, massive ice coverage, extraordinary light conditions, superstructure ice and rough water) navigation in the Arctic region is unique compared to any other marine area, with the exception of the Antarctica.³⁶ The AMSA differentiates between four types of voyages undertaken in the Arctic Ocean: destination transport, intra-Arctic transport, trans-Arctic transport and cabotage.³⁷ With regard to the purpose of the thesis, all four modes of navigation have to be taken into account. Yet trans-Arctic shipping is considered the one most prominent in public perception. Using the Arctic Ocean as a marine link, trans-Arctic navigation is defined as a full voyage between the Pacific and Atlantic Ocean or *vice versa*.³⁸ In consideration of the climatic circumstances, three Arctic routes have the potential to transform international shipping, namely the NWP, the NSR and a transpolar Central Arctic Ocean route. Annual variations in ice-conditions may change the most suitable route on a yearly basis and lead to a combination of all three routes.³⁹ Trans-Arctic commercial voyages have been conducted along both the NWP and NSR, mostly during the summer season. The NWP has seen the *SS Manhattan* becoming the first

³⁰ Melling 2002, p. 2

³¹ 1 nautical mile = 1,852 km

³² Borgerson 2008, p. 69

³³ For an overview of five water routes of the NWP, including routing, physical description and additional information see AMSA 2009, p. 21. Chircop refers to seven principal routes through Canadian Arctic waters; see *also* Chircop 2009, p. 356

³⁴ Arctic Marine Shipping Assessment AMSA 2009, p. 20

³⁵ *Ibid.*

³⁶ Jensen 2007, p. 2

³⁷ Arctic Marine Shipping Assessment AMSA 2009, p. 12

³⁸ *Ibid.*

³⁹ Molenaar 2009, p. 292

commercial ship to break through the passage in 1969, followed by several commercial passenger vessels, e.g. *MS Explorer*.⁴⁰

Compared with the predictions of usage for the NSR and the investments by both the Russian Federation and private shipping companies, the NWP is not expected to become a viable trans-Arctic route by 2020. The AMSA gives several reasons for this assumption: seasonal variability, changing ice conditions, the complexity of the routes, chokepoints, depth restrictions, lack of infrastructure and insurance limitations.⁴¹

A range of key issues outlines the complexity of trans-Arctic navigation. Economic and safety issues comprise among other things the need of specially designed polar ships navigating in ice-covered areas, their economic viability, a rise of insurance rates due to potential damage to cargoes in extreme cold temperatures and the, already-mentioned, insufficient maritime infrastructure.⁴²

Yet the outlook anticipates a growth in destination transport in the Canadian Arctic due to the increasing demand for seasonal re-supply activities (bulk shipments of raw materials), expanding resource developments and tourism.⁴³

Pollution from vessels is considered among the principal sources of marine environment contamination. It entails the discharge of pollutants from routine operations (operational pollution, e.g. the intentional discharge of oil) or because of vessel accidents (accidental pollution).⁴⁴ The increase in the various forms of Arctic marine transport could further lead to greater potential risks with serious environmental consequences, e.g. accidents of oil tankers and the introduction of environmental contaminants with severe impacts on the fragile Arctic marine biodiversity. Large oil spills are considered to be the largest marine environmental threat, with long-lasting and substantial impacts, e.g. the oil spill of the *Exxon Valdez* in southern Alaska in 1989.⁴⁵ *Figure 2* illustrates the NWP and NSR, as well as the Northeast Passage (NEP).⁴⁶

⁴⁰ For a comprehensive overview over all NWP-transits from 1903/06 to 2004, see USARC 2004, A-20

⁴¹ Arctic Marine Shipping Assessment AMSA 2009, p. 112

⁴² *Ibid.*, p. 103 and 104

⁴³ *Ibid.*, p. 112

⁴⁴ Tan 2006, p. 19 and 20

⁴⁵ Arctic Monitoring and Assessment Programme AMAP 2007, p. 24

⁴⁶ AMSA differentiates between the NSR as a set of marine routes from the Kara Gate to the Bering Strait, see Arctic Marine Shipping Assessment AMSA 2009, p. 23, and the NEP as the entire set of sea routes from northwest Europe along the north coast of Siberia through the Bering Strait to the Pacific Ocean, see Arctic Marine Shipping Assessment AMSA 2009, p. 34

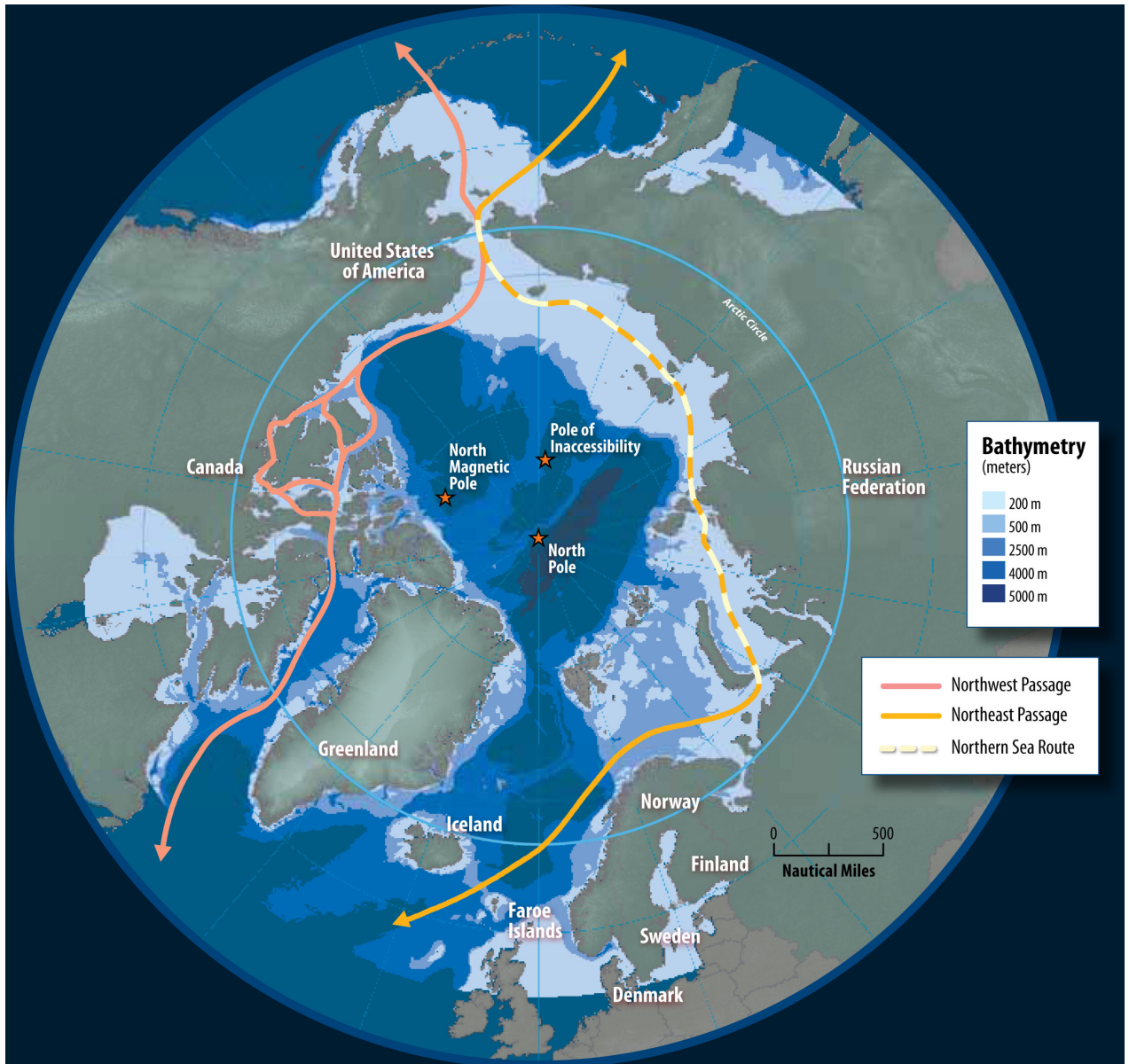


Figure 2 – The Arctic Marine Area (including NWP and NSR)

Source: AMSA 2009, p. 17 (Note: the design was slightly changed in comparison to the original)

2.4. International law on Arctic shipping – an overview

The law of the sea is the component of international law with regard to all uses and resources of the sea and the fundamental document of modern international ocean law. Its cornerstones, accompanying and including customary international law, are UNCLOS⁴⁷, often referred to as the constitution of the oceans, and two implementation agreements, the Part XI Deep-Sea Mining Agreement⁴⁸ and the Fish Stocks Agreement⁴⁹. By recognizing sovereignty, sovereign rights, rights, freedoms and obligations, UNCLOS' overarching objective is to establish a universally accepted legal order for the oceans. In this regard it balances the different rights and responsibilities of states in their capacities as coastal, port and flag states. Supplemented by a number of non-legally binding instruments, UNCLOS also accords "competent international organizations" a key-role in the Convention's implementation. The IMO is the United Nations' "competent organization" with regard to the international regulation and coordination of matters concerning maritime safety, efficiency of navigation and prevention and control of vessel-source pollution.⁵⁰ The promotion of the highest practicable standards for maritime safety or the exchange of information among member states, are only two of the comprehensive goals of the UN agency.

In accordance with the two main IMO treaties, SOLAS 1974⁵¹ and MARPOL 1973/78⁵², several other IMO instruments apply as well in the Arctic region and represent a set of international agreements, each addressed to specific challenges: COLREG 1972⁵³, London Convention 1972⁵⁴, STCW Convention 1978/1995⁵⁵, ISM

⁴⁷ All the Arctic states are parties to the convention with the exception of the US; see UN Division for Ocean Affairs and Law of the Sea, Oceans and Law of the Sea, <http://www.un.org/Depts/los/index.htm> Accessed 16 June 2011

⁴⁸ See Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982

⁴⁹ See Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

⁵⁰ Convention on the International Maritime Organization (IMO), as amended, Geneva, 6 March 1948

⁵¹ See International Convention for the Safety of Life at Sea, London, 1 November 1974 as amended (SOLAS 74)

⁵² See International Convention for the Prevention of Pollution from Ships, London, 2 November 1973, as amended (MARPOL 73/78)

⁵³ See Convention on the International Regulations for Preventing Collisions at Sea, London, 20 October 1972

⁵⁴ See Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 and its Protocol of 1996

⁵⁵ See International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, London, 1 December 1978, as amended (STCW 78)

Code 1993⁵⁶ or the BWM Convention 2004⁵⁷. Additionally, prompted by the *Exxon Valdez* disaster, the IMO has adopted Guidelines for Ships Operating in Arctic ice-covered Waters⁵⁸ and recently, the above-mentioned Guidelines for Ships Operating in Polar Waters, both recommendatory in nature. The PSSA Guidelines⁵⁹ are considered another relevant non-legally binding IMO instrument. The organization is currently in the progress of developing a Mandatory Polar Code, with the targeted completion in 2012.

On a regional level several bodies, e.g. the Arctic Council or the OSPAR Commission, have the possibility to influence the actions of their member states. Yet the Arctic Council does not have the competence to impose legally binding obligations on its members or non-members. The OSPAR Commission, whose competence in principle does not extend to navigation, has adopted some non-legally binding instruments, e.g. in the domain of the BWM Convention.⁶⁰ However, both bodies do not have any enforcement jurisdiction.

2.5. The Arctic region: an area of cooperation or conflict?

During the last decade the Arctic region has captured the attention and interests of policymakers, which resulted in an intensified political and economic orientation towards one of the earth's most remote areas. The region outpaced itself as an epiphenomenon of international politics and turned into a dynamic, uncertain political, legal and economic environment. Arctic coastal states share similar interests and extensively express their notion of sovereignty. Non-Arctic states urge to obtain their legal right to a say, as parts of the Arctic Ocean are high seas.⁶¹ Oversimplifications of complex multidimensional issues with regard to unresolved Arctic maritime

⁵⁶ See The International Safety Management Code, IMO Assembly Resolution A.741(18), 1993

⁵⁷ See International Convention for the Control and Management of Ships Ballast Water and Sediments, London, 13 February 2004

⁵⁸ See IMO Guidelines for Ships Operating in Arctic ice-covered Waters adopted by IMO MSC/Circ.1056, MEPC/Circ.399, 23 December 2002

⁵⁹ See Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, IMO Assembly Resolution A.982(24), 2005

⁶⁰ In that regard the OSPAR Commission has adopted voluntary guidelines to reduce the risk of non-indigenous species invasion through ballast water, see OSPAR Commission General Guidance on the Voluntary Interim Application of the D1 Ballast Water Exchange Standard by vessels leaving the Baltic Sea and transiting through the North-East Atlantic to other destinations, Agreement 2009-05, Brussels, 2009

⁶¹ Both China and Japan are increasing their activities in the Arctic, see Huebert 2008, p. 15

boundaries and the race for hydrocarbon resources interlinked with sovereignty issues, tend to visualize the Arctic as a region of conflict rather than cooperation.⁶²

Arguments are built bi-directional in favour and against a comprehensive, legally binding Arctic treaty. By now the international legal agenda is set by the law of the sea and its combination between UNCLOS and customary international law. Multilateral cooperation can lead to mutually desirable outcomes for states involved. International law can be considered the framework for international cooperation in all respects. Yet no state is bound to meet the legal requirements imposed by international law and elaborated by the international community.

Nevertheless, the realistic preference of a unilateral decision-making process by sovereign nations can be revised to reach and protect objectives set. Self-interested actors, e.g. sovereign nations rationally forgo independent decision-making and develop processes for multilateral regulations in case of dilemmas of common interests or common aversions.⁶³

This specified realistic approach of dual messaging becomes explicit when analyzing Canada's complex position on Arctic issues: emphasizing sovereignty, national security and national interests, as well as international cooperation and stewardship.⁶⁴

The proposed scope of this thesis with the explicit example of the NORDREG regulations and its international legal applicability will outline one specific illustration of Canada's Arctic perspective, cooperating or confronting with other international actors. Three famous occasions, fighting to balance coastal state rights with navigational and marine use interests, have made Canada known as "rocker of the boat"⁶⁵:

- the enactment of the AWPPA in 1970,
- the establishment of straight baselines around the Arctic Archipelago after the NWP-transit of the *USCGC Polar Sea* and
- the *Estai* incident, when Canada unilaterally "took-on" foreign overfishing beyond its 200 nm fishing zone.⁶⁶

⁶² For a comprehensive up-to-date analysis concerning the opportunities of cooperation and possibilities of conflict in the Arctic, see Brosnan/Leschine/ Miles 2011

⁶³ Stein 1982, p. 324. The framework of "common interest" and "common aversion" is described by Stein, see also Stein 1990

⁶⁴ Lackenbauer 2011, p. 4

⁶⁵ VanderZwaag 2000, p. 209

⁶⁶ Ibid.

These three examples illustrate Canada's possible unilateral course of action against the background of domestic pressure and considerations regarding sovereignty issues. Canada's on-going dilemma in the Canadian Arctic can be defined on how to balance sovereignty, security and stewardship as to protect national interests, promote sustainable development and facilitates circumpolar stability and cooperation.⁶⁷

3. Chapter III – International Legal Framework

3.1. Introduction

A perceived international need of change in the law of the seas led to the Third United Nations Conference on the Law of the Sea (UNCLOS III), a set of complex multinational negotiations which lasted from 1973 until 1982. Canada signed the Convention in 1982 and became a party by accession in 2003. The US has asserted that most of UNCLOS represents customary international law, in particular rights of navigation and overflight,⁶⁸ but has not signed the Convention yet. This has to be considered an important fact in the relationship between the two states as the UNCLOS dispute settlement process would not be a legal option in case of disagreement. Furthermore an assertion by the US of an UNCLOS provision does not *ipso facto* make Canada to accept this assertion.⁶⁹

3.2. UNCLOS and its Article 234

The special regime of Article 234, often referred to as the "Arctic exception clause", was directly negotiated by the states concerned, namely Canada, the US and the Soviet Union, and incorporated within the Convention without opposition.⁷⁰ The Article recognizes the right of coastal states to adopt and enforce non-discriminatory pollution prevention laws and regulations in ice-covered areas, that can be more stringent than generally accepted international rules and standards (GAIRAS) established under the auspices of the IMO⁷¹. This includes stricter discharge and safety standards, as well as standards for construction, design, equipment and manning (CDEM standards). No analogous provision for any other marine area is to

⁶⁷ Lackenbauer 2011, p. 4

⁶⁸ See President Ronald Reagan Statement on United States Oceans Policy, March 10, 1983

⁶⁹ McDorman 2009, p. 25

⁷⁰ UNCLOS 1982: a commentary, Volume IV 1991, p. 393

⁷¹ With regard to manning standards or radioactive cargo the International Labour Organization (ILO) and the International Atomic Energy Agency (IAEA), respectively are the responsible organizations.

be found within UNCLOS.⁷² Article 234 is considered a major exception to the limited coastal state's jurisdiction over vessel-source pollution. The Article reads as follows:

“Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.”⁷³

Its general objective is to balance the interests of the coastal state in the specified ice-covered area with the general interest of international navigation, stated in the “due regard to navigation” reference.⁷⁴ Additionally, Article 236 on *Sovereign immunity* applies with regard to Article 234 as provisions regarding the protection and preservation of the marine environment do not apply to any warship or non-governmental vessel.⁷⁵

The initiative of Canada to develop a special regime for ice-covered areas is heavily interlinked with the NWP-transit of the *SS Manhattan* in 1969. The voyage of the US registered oil tanker was the starting point for Canadian officials to create a specific nuanced and functional approach to the Canadian Arctic waters.⁷⁶ Based on the country's limited capacities, Canada initially supports limited initiatives with the potential to expand them to valid solutions by including international acceptance in the future.⁷⁷ The exercised offshore authority should only answer the purpose of the specified functional goals and not interfere with ocean activities unrelated to national jurisdiction, pollution control and fisheries. The AWPPA was the consequent result of

⁷² VanderZwaag/Chircop 2008, p. 9

⁷³ UNCLOS, Article 234

⁷⁴ UNCLOS 1982: a commentary, Volume IV 1991, p. 393

⁷⁵ UNCLOS, Article 236, see *also* UNCLOS 1982: a commentary, Volume IV 1991, p. 396 and 417. Yet several commentators question this strict interpretation, see *also* Legal aspects of Arctic shipping. Summary report 2010, p. 13

⁷⁶ McRae 1987, p. 100

⁷⁷ Huebert 2001, p. 251; McRae describes the approach as both radical (creating a rethinking of the traditional doctrine of the law of the sea at that time) and novel (environmental considerations were put in the forefront), see McRae 1987, p. 101

this new approach and consideration⁷⁸, but needed a forum and/or regime to be legally valid. In this regard the negotiation and later implementation of Article 234 can be considered a major achievement of Canadian foreign policy.⁷⁹ Yet it seems difficult to recapitulate the exact negotiation-process between the three Arctic littoral states directly involved⁸⁰. One view is that the US would allow unilaterally adopted coastal state environmental provisions for ice-covered areas in exchange for the Canadian acquiescence to the international straits regime of UNCLOS, with the Soviet Union benefiting from both positions.⁸¹ The special regime of Article 234 is largely perceived as a highly specialized provision that served as a side-deal necessary for the acceptance of UNCLOS.⁸² The different interests of Canada and the US with regard to Article 234, including the legal status of the NWP, will be discussed at a later point of this chapter.

The implementation and interpretation of Article 234 depends heavily on current and future state practice. By now only Canada and the Russian Federation⁸³ have adopted national legislation based on Article 234.⁸⁴ The practices of the Russian Federation and the US are of considerable interest as both states are considered to be great powers with regard to their status as maritime states and their navigational interests. Yet it has to be pointed out that any discussion related to Article 234 has to keep the unilateral maxim of the provision and the consequently ambiguous relationship between the states entitled to invoke Article 234 and the IMO in mind. On the one hand, Arctic coastal states are legally positioned to develop and enforce appropriate rules, based on Article 234. The Article does not require any conformity of CDEM standards with GAIRAS.⁸⁵ On the other hand, the IMO is considered the only “competent international organization”, which can adopt global rules and standards for navigation.⁸⁶ In this respect the inevitable international character of shipping influences the correlation between the IMO on the one hand and Article 234,

⁷⁸ The AWPPA will be discussed into detail in Chapter 4.1.

⁷⁹ McRae 1987, p. 110

⁸⁰ Bartenstein points out the concern of deliberate or accidental vessel source oil pollution as the main reason for the three states involved to negotiate Article 234, see Bartenstein 2011, p. 24

⁸¹ Brubaker 2005, p. 44

⁸² Huebert 2001, p. 249

⁸³ See the analysis by Brubaker 2005 with respect to the compatibility of Russian state practice with Article 234. For a detailed analysis regarding the legal regime of navigation in the Russian Arctic, see Franckx 2009

⁸⁴ Additionally, Brubaker notes that Norway (in relation to Svalbard) has adopted provisions along the lines of the ISM Code by implementing Article 234 elements, see Brubaker 2010, p. 9

⁸⁵ Yet the envisaged regulation must have “due regard to navigation”, see Churchill/Lowe 1999, p. 348

⁸⁶ Chircop 2010, p. 181

and the special enforcement measures for coastal states hereunder, on the other hand.

In addition, two main remarks have to be offered with respect to Article 234 and the relationship between Canada and the US. Firstly, does the US, as a non-party to UNCLOS, accept the provision as a part of customary international law?⁸⁷ Secondly, will the US recognize Canada's Arctic waters legislation as jurisdiction permitted by Article 234, in case of an above acceptance?

The US could further argue that Article 234 is not applicable, and instead the traditional marine environmental regime, in the present case Article 211, 218-220 and customary international law, would apply.⁸⁸

3.3. The equivocal meaning of Article 234

The ambiguity of the text, due to the different interests of the involved Arctic coastal states, poses an interpretive problem with regard to coastal state prescriptive and enforcement jurisdiction in ice-covered areas. The broad privileges, stipulated in the Article, are subject to several restrictions and limited to a special purpose with an either expansive or limited scope of interpretation and further application. The legal interpretation⁸⁹ of Article 234 includes the following terms: "where", "non-discriminatory laws", "due regard to navigation", "within the limits of the exclusive economic zone" (EEZ) and "environmental protection based on the best available scientific evidence".⁹⁰ Bartenstein divides the conditions for the application of Article 234, in a similar way, into three types: a territorial, a temporal and a material scope of the provision.⁹¹

This section will outline the various forms of interpretation of the introduced terms. Due to the limited scope of the thesis, the interpretation cannot be conducted in its entirety. Nevertheless it will provide the basis for the further discussion regarding the legal applicability of NORDREG based on Article 234 and its need to be a law or regulation for the prevention, reduction and control of marine pollution from vessels in ice-covered areas (research question No. 1).

⁸⁷ Pharand argued in favour of acceptance of Article 234 being customary international law, see Pharand 1980, p. 465 and 466. Hoyle also indicates the Article reflecting existing international law, see Hoyle 1983, p. 135

⁸⁸ Brubaker 2005, p. 45

⁸⁹ For a comprehensive up-to-date analysis of Article 234, see Bartenstein 2011

⁹⁰ Brubaker 2005, p. 54. Regarding the interpretation of "non discriminatory laws", see also Brubaker 2005, p. 55 and 56

⁹¹ Bartenstein 2011, p. 28. The material scope comprises the relationship between Article 234 and Article 236 and was commented on in Chapter 3.2

In comparison to other UNCLOS Articles, e.g. Article 211, paragraph 5, Article 234 does not mention the pre-approval by the “competent international organization” as a precondition to adopt laws and regulations for the prevention, reduction and control of marine pollution from vessels. The absence of this reference strengthens the interpretation of a greater unilateral coastal state prescriptive jurisdiction over specific ice-covered areas than determined by GAIRES through the IMO.⁹² The deficiency of an international review process under the auspices of the IMO is considered one of the few certitudes of Article 234 and was strongly opposed by the US and other maritime powers during the early years of the negotiation process.⁹³

“where” to “when”?

McRae and Goundrey define the meaning of the term “where” as the key to the interpretation of Article 234, offering both a restrictive (narrow) and broad interpretation of the Article.⁹⁴

A restrictive interpretation would render the spatial meaning of “where” into the temporal meaning of “when”. Only in the case (“when”) of severe climatic conditions, including the presence of sea ice for most of the year, with the possibility of creating exceptional hazards to navigation, which could lead to major harm of the ecological balance, a coastal state has the right to adopt and enforce non-discriminatory laws and regulations on the basis of Article 234. This narrow interpretation indicates that a coastal state can only rely on Article 234 if the above-mentioned necessary conditions prevail.⁹⁵ Furthermore, laws or regulations based on Article 234 have to be designed specifically in order to deal with the severe climatic conditions arising.⁹⁶

The broader interpretation⁹⁷ highlights the spatial meaning of “where” by outlining the geographical area to which Article 234 applies. This more literal form of interpretation renders the reference to the various conditions redundant and essentially repetitive as a simply specification of the area as one covered by ice for most of the year would have been enough.⁹⁸

⁹² Brubaker 2005, p. 54

⁹³ Bartenstein 2011, p. 37

⁹⁴ McRae/Goundrey 1982, p. 216-222

⁹⁵ Bartenstein 2011, p. 30

⁹⁶ McRae/Goundrey 1982, p. 219

⁹⁷ Implicit support for the broad interpretation is drawn by McRae and Goundrey by comparing the wording and limitations of Article 211, paragraph 6 and Article 234, see also McRae/Goundrey 1982, p. 218

⁹⁸ Ibid., p. 217

Two further obstacles with regard to an adequate interpretation are already found in the *travaux préparatoires*: a missing definition of “ice” and “ice-covered areas” and the absence of published material to explain the expression “most of the year”.⁹⁹ Conditions in temperature and the thickness of sea ice vary from year to year, making an exact predictability impossible. Based on these changing natural conditions the practical application of a restrictive interpretation seems to be less attractive.¹⁰⁰

Both Canada’s and the Russian Federation’s practice indicate a broad interpretation. The position of the US seems to be unclear, although a restrictive interpretation would evidently strengthen the position of a flag state.¹⁰¹

Based on the analysis of the interpretation’s practical attraction it seems essential to briefly examine the terms “due regard to navigation”¹⁰² and “within the limits of the exclusive economic zone”. With regard to the two terms and a combined examination, two possibilities and again a narrower and broader interpretation, respectively, seem evident. Brubaker concludes that despite an applicable limitation of Article 234 to the EEZ, a coastal state could not exercise greater rights in the EEZ than in the territorial sea.¹⁰³ The crucial question occurring, in particular with regard to the NWP, concerns the possible application of Article 234 to the territorial sea and international straits (within the territorial sea).¹⁰⁴ Article 55 defines the EEZ as an area beyond and adjacent to the territorial sea.¹⁰⁵ The broad interpretation would decode the term “limits” only to the outer limits of the EEZ¹⁰⁶, implicitly ignoring Articles 3, 4 and 55. Yet this argumentation would give coastal states the argumentative opportunity to adopt more stringent measures than allowed for by the regimes of innocent¹⁰⁷ and transit passage¹⁰⁸ and could strengthen an environmental protection-related argumentation.¹⁰⁹ This teleological argumentation is held by

⁹⁹ UNCLOS 1982: a commentary, Volume IV 1991, p. 397

¹⁰⁰ Bartenstein 2011, p. 31

¹⁰¹ Brubaker 2005, p. 55

¹⁰² For an up-to-date examination of the due regard clause, see Bartenstein 2011, p. 41-45

¹⁰³ Brubaker 2005, p. 57

¹⁰⁴ Coastal states enjoy full sovereignty over their internal waters; see Churchill/Lowe 1999, p. 61. Due to this legal precondition coastal states do not need to rely on Article 234 regarding its jurisdictional authority in this area.

¹⁰⁵ UNCLOS, Article 55

¹⁰⁶ Article 57 indicates a 200nm maximum extension of the EEZ, measured from the coastal state’s baselines, see UNCLOS, Article 57

¹⁰⁷ UNCLOS, Article 17-26 and 45

¹⁰⁸ UNCLOS, Article 37-44

¹⁰⁹ Bartenstein 2011, p. 29

Pharand¹¹⁰ and conclusively contended by McRae and Goundrey¹¹¹, who support a literal interpretation, recognizing the inner and outer limits of the EEZ.

The balance between the interests of a coastal state and the general interests of international navigation and flag states, respectively, is legally outlined in the due regard clause as any specific kind of reference to prescription or standard-setting is lacking. Furthermore, the term “due regard to navigation” has to be considered with respect to the above-mentioned “where-when” terminology. It dictates that any law or regulation based on Article 234 is only permitted where and when necessary.¹¹²

Yet the Article’s due regard clause could imply a *sui generis* meaning in the context of Article 234, as suggested by Bartenstein.¹¹³ This unique characterization entails that “due regard to navigation” does not refer to the navigational rights regimes, e.g. innocent passage, transit passage, in UNCLOS. Furthermore the traditional “due regard to navigation” balance between coastal state interests (→ environmental considerations) and flag state interests (→ navigational considerations) would be superseded by the *sui generis* connotation and a relatively greater weight to environmental considerations.¹¹⁴ However, this characterization implicitly excludes a broader interpretation of the term. A coastal state cannot apply Article 234 if only a limited correlation to environmental concerns is considered.

The purpose of Article 234 is to authorize Arctic coastal states to prescribe and enforce special laws and regulations, subject to certain restrictions with regard to a specific geographical area. It could be argued that the *sui generis* meaning, including stronger coastal state rights, implicitly broadens the interpretable gist of the phrase “within the limits of the [EEZ]”, strengthens the environmental considerations and would consistently allow the coastal state to apply special measures within the full 200nm from the measured baselines, including the territorial sea and international straits.¹¹⁵

The measures a coastal state can actually adopt are heavily linked to the phrases “due regard to navigation” and “on the best available scientific evidence”. Despite the *sui generis* characterization of “due regard to navigation”, the coastal states’ interests, expressed by a law or regulation based on Article 234, have to be

¹¹⁰ Pharand 2007, p. 47. According to Churchill and Lowe the term “within the limits of the EEZ” seems to include the territorial sea as well, see Churchill/Lowe 1999, p. 348

¹¹¹ McRae/Goundrey 1982, p. 221

¹¹² Molenaar 1998, p. 420

¹¹³ Bartenstein 2011, p. 45

¹¹⁴ Ibid.

¹¹⁵ Brubaker 2005, p. 57

based upon adequate scientific knowledge of the Arctic marine area and its environment, indicating a valid relationship between the measures adopted and the conditions in the specified region occurring. In that regard a competent international organization, e.g. the Arctic Council or the International Arctic Science Committee (IASC), could act as an international forum of communication and scientific exchange. The term indicates an implicit contribution of the international community with regard to the enactment of laws and regulation based on Article 234. On the other hand, the broad meaning of the term “best available scientific evidence” points toward a dynamic interpretation of the coastal state’s possibility to apply a precautionary approach¹¹⁶ in order to justify its legal measures.¹¹⁷ This kind of interpretation further indicates that regulations based on Article 234 do not necessarily have to be bound to the CDEM character of the AWPPA, which gave rise to the Article. It can be argued that a contemporary understanding of the provision could additionally include vessel traffic systems.

In summary, great emphasis has to be laid upon the interpretative ambiguity of Article 234 and the uncertainties regarding the specific rights of coastal states. The interpretative problem concerning the application of Article 234 to international straits will be covered in the next chapter in the context of the jurisdictional baggage of the NWP.

¹¹⁶ Although the legal status of the precautionary approach/principle remains an open question, several commentators consider it a principle of customary international law; see Trouwborst 2007

¹¹⁷ Brubaker 2005, p. 58

3.4. Internal waters vs. international strait: the jurisdictional baggage of NORDREG

3.4.1. Introduction

As will be outlined later in the thesis, the NORDREG regulations apply to all Canadian Arctic waters and consequently cover the above-mentioned various routes of the NWP. The following subchapter will introduce the jurisdictional baggage of the NWP¹¹⁸ and the legal debate, mostly between Canada and the US, concerning the status of the passage under international law. In this respect the subsequent considerations will be addressed: are the waters of the Canadian Arctic Archipelago internal waters, based on the claim of an historic title (→ historic waters) and the establishment of straight baselines? If the waters of the Canadian Arctic Archipelago are not internal waters, is the NWP an international strait and if not, subject to the right of innocent passage? The last question relates to the legal relationship between the status of the NWP and Article 234.

The Canadian Arctic is of vital interest for the country and represents an important part of Canada's national identity. However, Canada's basis to sovereignty in the region is a multifaceted issue, with strategic, economic, security and environmental value. Canada has not yet presented a submission to the Commission on the Limits of the Continental Shelf with regard to the Arctic Ocean. Notably the US and member states of European Union (EU) contest the Canadian claims regarding the waters surrounding the Canadian Arctic Archipelago.¹¹⁹

The US' interests in the Arctic region are aimed at energy independence, e.g. the exploitation of hydrocarbon resources, and the notion of the freedom of the seas and strategic mobility as cornerstones of US foreign policy.¹²⁰ A successful unilateral approach of Canada could influence other waterways, to the detriment of US interests. The EU, whose member states collectively own the world's largest merchant fleet, wants to gradually improve Arctic commercial navigation and is intent on defending its navigational rights.¹²¹

¹¹⁸ For a detailed analysis regarding the legal status of the NWP, see Pharand 2007

¹¹⁹ Huebert further articulates a possible reservation about the Canadian claim by Japan, see Huebert 2003, p. 305

¹²⁰ Byers 2010, p. 78

¹²¹ Legal aspects of Arctic shipping. Summary report 2010, p. 5

The 1988 Arctic Cooperation Agreement¹²² defines today's relationship between Canada and the US with respect to their Arctic waters. Both states affirm that they "agree to disagree" on the status of the NWP under applicable international law. It demonstrates the capacity and willingness to pragmatically overlook legal disputes and collaborate in functional terms. In this case Canada respects US icebreaker vessel traffic through the NWP while both states maintain their position on the international legal status of the passage.¹²³

3.4.2. Internal waters (historic title and straight baselines)

There is no disagreement that the waters of the Canadian Arctic Archipelago and the NWP, respectively, are under Canadian jurisdiction. The dispute on hand arises from the strict legal status of the concerned waters. Does a foreign vessel have a navigational right (innocent or transit passage) or can Canada require vessels to obtain permission to utilize the waters?¹²⁴

The following initial points summarize the complex dispute:

Canada considers the NWP as part of its internal waters¹²⁵. This claim is based on two positions. First, the waters are internal by virtue of an historic title (→ historic waters). Second, the waters are internal on grounds of straight baselines drawn around the Canadian Arctic Archipelago (→ straight baseline claim). Thus the legal consequences with regard to navigational rights would preclude the right of innocent passage by reason of the historic title. However, innocent passage would be legally ensured resting upon Article 8, if only the second line of argumentation would be legally considered. This Article stipulates a continuous right of innocent passage within internal waters that were enclosed by straight baselines and have not been previously considered internal.¹²⁶

Other states, e.g. US, and member states of the EU hold the view that the waters of the NWP are not internal but rather form an international strait.¹²⁷ In that

¹²² Canada and United States of America. *Agreement on Arctic Cooperation*. Signed at Ottawa on 11 January 1988

¹²³ McDorman 2009, p. 3

¹²⁴ *Ibid.*, p. 208

¹²⁵ Article 8 defines "internal waters" as waters on the landward side of the baseline from which the territorial sea is measured, see UNCLOS, Article 8

¹²⁶ UNCLOS, Article 8, para. 2

¹²⁷ In its updated Arctic Region Policy the US clearly state that the NWP is a strait used for international navigation, see United States, The White House 2009

case, states could enjoy the right of transit passage, resting upon Article 37 and 38, if the waters concerned qualify as an international strait.

Historic waters

The concept of historic waters is considered to be a regime that constitutes an exception to the general rules of law¹²⁸, with neither UNCLOS nor the 1958 Convention on the Territorial Sea and the Contiguous Zone (TSC)¹²⁹ offering a profound explanation.¹³⁰

According to the definition by the ICJ, stated in the *Fisheries* case (United Kingdom vs. Norway), “historic waters” are “usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title”.¹³¹ A 1962 study on the *Juridical Regime of Historic Waters, including Historic Bays*, requested by the International Law Commission (ILC), concluded that the legal status of historic waters either being considered as internal waters or parts of the territorial sea, would depend on the sovereignty exercised over the specified area by the claiming state.¹³²

The study further determines three basis requirements for the existence of an historic title. These three factors are an exclusive exercise of state jurisdiction, the continuity of such exercise and the acquiescence of foreign states.¹³³ In accordance with these requirements¹³⁴, Bouchez defines historic waters as “waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States.”¹³⁵

The Canadian claim was for the first time clearly expressed in 1973 by a statement of the Bureau of Legal Affairs. It stipulates “that the waters of the Canadian Arctic Archipelago are internal waters of Canada, on an historical basis, although they have not been declared as such in any treaty or by any legislation.”¹³⁶ It further states that Canada has similar historic claims to the waters of the Gulf of St.

¹²⁸ Pharand 1971, p. 2

¹²⁹ See Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958

¹³⁰ For a comprehensive overview regarding historic waters, see Symmons 2008

¹³¹ *Fisheries* case, Judgment of December 18th, 1951: ICJ Reports 1951, p. 130

¹³² International Law Commission (ILC) Yearbook, Vol. II, 1962, p. 25

¹³³ *Ibid.*

¹³⁴ The claiming state has to prove the satisfied fulfilment of the requirements (→ burden of proof), see *Ibid.*

¹³⁵ Bouchez 1964, p. 281

¹³⁶ The Canadian Yearbook of International Law (CYIL) 1974, p. 279

Lawrence, the Bay of Fundy, Dixon Entrance, Hecate Strait and Queen Charlotte Sound.¹³⁷

Several commentators conclude that the Canadian historic internal waters claim is rather weak with an implausibility to meet the necessary requirements.¹³⁸ The Arctic state is not in a position to lift the burden of proof with regard to the exclusive exercise of state jurisdiction and the acquiescence of foreign states. Neither could it succeed in subjecting all foreign ships to prior authorization before entering the NWP nor did other states acquiesce in the Canadian claim.¹³⁹

The missing international acceptance is clearly evident with regard to the claim that the waters are internal on grounds of straight baselines drawn around the Canadian Arctic Archipelago and consequent international protest. Both the historic internal water claim and the straight baseline claim can be considered separately or in addition to each other.

Straight baselines

The concept of straight baselines was developed in context of the Norwegian baselines claim (→ *skjærgaard*), legally recognized in the ICJ *Fisheries* case and consequently adopted within TSC, Article 4 and UNCLOS, Article 7.¹⁴⁰ Three basic criteria are considered necessary in the present case law and mentioned treaty law: a) the general direction of the coast, b) the relationship between sea and land formations and c) particular economic interests evidenced by long usage.¹⁴¹

Provoked by the NWP-transit of the *USCGC Polar Sea*, the Canadian government adopted further measures to strengthen its historic internal waters claim. The instantaneous, but legally controversial establishment of straight baselines¹⁴² around the Canadian Arctic Archipelago, already mentioned as one of the three “rocker of the boat” occasions, was the most restrictive instrument. On 10 September 1985, Joe Clark, Secretary of State for External Affairs at that time, announced that the Canadian government, based on an Order in Council, established straight

¹³⁷ The Canadian Yearbook of International Law (CYIL) 1974, p. 279

¹³⁸ See Pharand 2007, p. 13 and McDorman 1986, p. 250

¹³⁹ Pharand 2007, p. 13

¹⁴⁰ See TSC, Article 4, paragraph 1 and *verbatim* UNCLOS, Article 7, paragraph 1: “In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.”

¹⁴¹ See *Fisheries* case, Judgment of December 18th, 1951: ICJ Reports 1951, p. 133; TSC, Article 4 and UNCLOS, Article 7

¹⁴² Kraska defines the claim “inconsistent with the Law of the Sea Convention”, see Kraska 2009, p. 1126

baselines around the outer perimeter of the Canadian Arctic Archipelago, which define the outer limit of Canada's "historical internal waters". Furthermore Canada's territorial waters should extend 12 nm seaward of these baselines.¹⁴³ Yet Canada was neither a party to TSC or UNCLOS and therefore based its claim on customary international law, recognized in the ICJ's *Fisheries* case.

The explicit reference to "historical internal waters" substantiated the historic title claim and was asserted despite protests by the US and the member states of the European Community (EC)¹⁴⁴, with none taking the opportunity to take the matter to the ICJ.

In comparison with the historic internal waters claim, Canada's baseline position has strong legal arguments under international law. Straight baselines may be drawn "in localities where the coastline is deeply indented and cut into" or where "there is a fringe of islands along the coast in its immediate vicinity".¹⁴⁵ Further "the drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters".¹⁴⁶ In his comprehensive analysis, Pharand considers the necessary criteria as met, including several other considerations: the length of straight baselines, the consolidation of title for certain straight baselines by the exercise of state authority, long usage and general international toleration.¹⁴⁷ Consequently, Pharand concluded that the Canadian Arctic Archipelago qualifies for the usage of straight baselines under customary international law. Accordingly, the enclosed waters meet the requirement to have the status of internal waters.¹⁴⁸

In summary, it can be stated that the Canadian historic internal waters claim is not legally sustainable and a preclusion of innocent passage to this effect not possible. However, the legal grounds with regard to the establishment of straight baselines and an inclusion of the waters enclosed as internal waters are deemed to be adequate. Based on UNCLOS, Article 8, paragraph 2 the right of innocent passage in these waters still remains. Yet Canada was not a state party to UNCLOS when adopting straight baselines in 1985. The Arctic state acted under customary

¹⁴³ The Canadian Yearbook of International Law (CYIL) 1986, p. 418

¹⁴⁴ United States Department of State (Bureau of Oceans and International Environmental and Scientific Affairs) 1992, p. 29 and 30

¹⁴⁵ UNCLOS, Article 7, paragraph 1

¹⁴⁶ UNCLOS, Article 7, paragraph 3

¹⁴⁷ Pharand 2007, p. 17-28

¹⁴⁸ *Ibid.*, p. 28

international law. Does this circumstance decisively affect the apparent right of innocent passage?

Both Pharand and McRae strongly argue that the applicable treaty provisions do not bind Canada.¹⁴⁹ Pharand breaks the discussion down to a differentiation between the existence of a right of innocent passage before and after 1985. Prior to the establishment of straight baselines, regardless of their legal applicability, two areas of territorial waters existed in the NWP.¹⁵⁰ The existence of a right of innocent passage through the territorial sea is closely interlinked to the notion of territorial sea, with both concepts developing in parallel.¹⁵¹ Furthermore, the rule of innocent passage was an accepted state practice prior to the implementation of the TSC and UNCLOS.¹⁵² With regard to international straits, the ICJ recognized in the *Corfu Channel* case that in accordance with international custom, warships (and *a fortiori* merchant ships) have a right of innocent passage through these waters.¹⁵³ Following this decision, the right of innocent passage was generally accepted as part of customary international law before 1985.

Before Canada's straight baselines claim, the waters of the NWP consisted of territorial waters and high seas. Based on the above facts and stipulated in TSC, Article 14 and UNCLOS, Article 17 it seems evident that a right of innocent passage has developed over time and existed within the territorial waters of the NWP prior to 1985. According to UNCLOS, Article 25, Canada could have temporarily suspended the right of innocent passage for the protection of its security.¹⁵⁴

This clear conclusion falls apart when considering the legal situation after the Canadian claim. The *Fisheries* case does not indicate the existence of a right of innocent passage in waters enclosed by straight baselines. Only the TSC and UNCLOS consequently provided the additional clause, recognizing a continuously existing innocent passage in waters, which are internal due to the establishment of straight baselines but have been considered territorial or high seas before.¹⁵⁵ According to Pharand the enclosed waters of the Canadian Arctic Archipelago would be subjected to the right of innocent passage if drawn under the TSC but not if drawn

¹⁴⁹ Pharand 2007, p. 42-44 and McRae 2007, p. 13 and 14

¹⁵⁰ Pharand 2007, p. 42

¹⁵¹ Churchill/Lowe 1999, p. 81

¹⁵² Lee 2005-2006, p. 411

¹⁵³ *Corfu Channel* case, Judgment of April 9th, 1949: ICJ Reports 1949, p. 28 (Merits)

¹⁵⁴ UNCLOS, Article 25

¹⁵⁵ See TSC, Article 5, paragraph 2 and UNCLOS, Article 8, paragraph 2

under customary international law by virtue of the *Fisheries* case.¹⁵⁶ It is further argued that TSC, Article 5, paragraph 2 has not become part of customary international law in 1985 due to lacking state practice and that the enclosed waters had already acquired the status of internal waters at the Canadian accession to UNCLOS in 2003.¹⁵⁷ Hence the new treaty-law rules, displayed in both conventions, do not have any legal impact on Canada's claimed internal waters.

However, Franckx contests this legal reasoning by referring to Article 309, which stipulates that UNCLOS allows for no reservations or exceptions, unless expressly permitted by other articles.¹⁵⁸ Consequently, Canada is obliged to accept the content of Article 8, exactly as it is worded, since it ratified the Convention in 2003.¹⁵⁹

Yet if the NWP is considered an international strait, each state, according to UNCLOS, Article 38, enjoys the right of transit passage through straits, which are used for international navigation. Hence the following question has to be posed: can the NWP be regarded an international strait?

3.4.3. International straits

The term "strait" is neither defined in TSC nor in UNCLOS. The rights of coastal and flag states are not determined by any explicit definition of "strait", but rather by the legal status of the waters constituting the strait.¹⁶⁰ Although a legal regime for "straits used for international navigation" was agreed on during UNCLOS III, the actual definition is part of customary international law and can be found in the *Corfu Channel* case. Concerning this matter, the ICJ distinguished between two crucial criteria, a geographical and a functional one, in order to characterize a strait used for international navigation. Yet the court held that "the decisive criterion is (...) its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation."¹⁶¹ Churchill and Lowe suggest that the Corfu Channel's secondary importance as a sea route and the actual volume of traffic are irrelevant to the right of passage through it.¹⁶² By contrast, Pharand holds the opinion

¹⁵⁶ Pharand 1988, p. 155

¹⁵⁷ Ibid. 2007, p. 43 and 44

¹⁵⁸ UNCLOS Article 309

¹⁵⁹ Franckx 1993, p. 105

¹⁶⁰ Churchill/Lowe 1999, p. 102

¹⁶¹ *Corfu Channel* case, Judgment of April 9th, 1949: ICJ Reports 1949, p. 28 (Merits)

¹⁶² Churchill/Lowe 1999, p. 103

that according to the coordinative conjunction “ainsi que” (as well as) in the French text, the two criteria are of equal importance.¹⁶³

It is undisputed that the NWP meets the geographic criteria articulated in the *Corfu Channel* case and stipulated in Article 37¹⁶⁴ as it undoubtedly connects two parts of the high seas and EEZ, respectively by linking the Atlantic and Pacific Oceans. The controversial issue between Canada and in particular the US is outlined in the interpretation of the functional phrase “being used for international navigation” if one considers a debatably equality of both criteria. Does the wording indicate the necessity of actual international maritime traffic use (Canada’s notion) or a potential use (US’ notion)?

Koh argues that both the geographical and functional requirement must be met.¹⁶⁵ The functional condition, laid down in Article 37 and borrowed from TSC, Article 16, paragraph 4, has yet not been the subject of any authoritative interpretation. In that case, the judgement in the *Corfu Channel* case still has to be recalled.¹⁶⁶ It emphasizes the actual usage requirement but simultaneously neglects the necessity of specifying a certain volume of traffic.¹⁶⁷

The ICJ held the view that the Corfu Channel was already a useful route for international maritime traffic by indicating 2.884 vessels passing the Channel within nine months.¹⁶⁸ In his recent comprehensive study, Pharand takes a different view of the functional criteria and concludes that the volume indication is necessary when interpreting the functional requirement and determining the actual usage. Accordingly, a strait may only be considered international if it already has a history as a useful route for international maritime traffic.¹⁶⁹ The NWP would therefore fail to be a strait used for international navigation.¹⁷⁰ In this case, only a ruling through a competent international legal court (e.g. International Tribunal for the Law of the Sea (ITLOS), ICJ) or a binding agreement among the interested states could reach legal certainty.

¹⁶³ Pharand 2007, p. 35

¹⁶⁴ See UNCLOS, Article 37: “This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”

¹⁶⁵ Koh 1987, p. 178

¹⁶⁶ Ibid., p. 180

¹⁶⁷ Ibid.

¹⁶⁸ *Corfu Channel* case, Judgment of April 9th, 1949: ICJ Reports 1949, p. 28 and 29 (Merits)

¹⁶⁹ Pharand 2007, p. 35

¹⁷⁰ Ibid., p. 42; his conclusion is based on the control exercised by Canada over an even small number of foreign transits, see Ibid., p. 36-42

In summary, commentators stated that the NWP does not qualify as an international strait based on the circumstances today. Yet an internationalization of the passage, due to the possibility of an increase of foreign commercial navigation in the Arctic region, could create the legal right of transit passage¹⁷¹. “A pattern of international shipping across the Passage, developed over relatively few years, might be considered sufficient to make it international.”¹⁷² Yet ships and aircrafts in transit would be bound by the legal obligations provided under UNCLOS Articles 39, 40 and 41. Canada’s right to protect the waters of a possible international strait are stipulated in UNCLOS Articles 42, 233 and 234.

3.4.4. Applicability of Article 234 in a strait used for international navigation

Another debatably issue is considered in the legal applicability of Article 234 in straits used for international navigation. Neither does Article 234 address the possibility of straits (subject to transit passage) lying completely or partly within ice-covered areas¹⁷³ nor does UNCLOS give any guidance whether the regime of transit passage trumps the regime of Article 234 or *vice versa*.¹⁷⁴ As already outlined above, Article 234 is included in a special section by itself (Part XII, Section 8, ice-covered areas). If read in the context with Article 233, which provides that “nothing in sections 5, 6 and 7 affects the legal regime of straits used for international navigation”¹⁷⁵, it can be argued that section 8 (and Article 234) should have been added to these stipulations, if it would have been the intention to apply the legal regime of straits used for international navigation to those within ice-covered areas.¹⁷⁶ As annotated in the *travaux préparatoires*, Article 233 does not apply to section 8 by its terms.¹⁷⁷ Based on the missing reference of Article 234 in the other sections of Part XII McRae further concluded that the international straits regime is not applicable to the NWP.¹⁷⁸ According to Pharand, Article 234 would continue to apply even if the NWP became an international strait.¹⁷⁹

¹⁷¹ Article 44 stipulates that the coastal state shall not hamper and suspend transit passage, see UNCLOS, Article 44

¹⁷² Pharand 2007, p. 44

¹⁷³ Molenaar 1998, p. 420

¹⁷⁴ Koivurova/Molenaar 2009, p. 28

¹⁷⁵ UNCLOS, Article 233

¹⁷⁶ Pharand 2007, p. 46 and 47

¹⁷⁷ UNCLOS 1982: a commentary, Volume IV 1991, p. 393

¹⁷⁸ McRae 1987, p. 110

¹⁷⁹ Pharand 1979, p. 123

Due to the missing exemption of straits from the application of Article 234, the controversial questions of interpretation, indicated in Chapter 3.3, would equally rise.¹⁸⁰ Considering the above outlined broad and narrow interpretations of Article 234, it would be irrelevant under the broad interpretation if the waters of the NWP would constitute an international strait or not.¹⁸¹ The narrow interpretation indicates that a coastal state can only rely on Article 234 if the necessary conditions (severe climatic conditions, the presence of ice, etc.) prevail. If regulations enacted to prevent marine pollution, do not result from these conditions, the normal rules, e.g. based on Article 211, applicable to the EEZ, including where appropriate to international straits, would apply.¹⁸² If these internationally agreed rules and standards to prevent, reduce and control pollution of the marine environment from vessels would be inconsistent with the protection of the fragile Arctic environment, the only remaining option for Arctic coastal states would be unilateral actions seeking to make the waters “internal waters”, as suggested by McRae and Goundrey.¹⁸³

In summary, it can be stated that the applicability of Article 234 in straits used for international navigation decisively depends on the used interpretation, either broad or narrow, of Article 234 itself. Given the fact that Article 233 does not extend to Article 234, allows for the interpretation of the adoption of more stringent pollution control standards than those applying to straits used for international navigation in a less severe, more moderate climate.¹⁸⁴ In line with the *sui generis* meaning of Article 234, outlined in Chapter 3.3, this argumentation would further strengthen the Canadian position.

¹⁸⁰ Arctic Marine Shipping Assessment AMSA 2009, p. 53

¹⁸¹ McRae/Goundrey 1982, p. 227

¹⁸² Ibid.

¹⁸³ Ibid., p. 228

¹⁸⁴ Rothwell 1993, p. 370

4. Chapter IV – Canadian Legal Framework

4.1. AWPPA and further developments

The waters of the NWP became a high-profile issue between Canada and the US as a result of the discovery of oil at Prudhoe Bay in Alaska and the transit voyage of the *SS Manhattan*.¹⁸⁵ The passage was interpreted by Canada as a direct challenge to Canadian sovereignty over the concerned area and an indirect threat to the Arctic environment.¹⁸⁶ Canada's functional response to the voyage resulted both in the enactment of the AWPPA, including regulations adopted thereunder, and the extension of the width of the Canadian territorial sea from 3 nm to 12 nm¹⁸⁷, capturing most of the waters of the NWP as territorial waters. The spatial scope of the AWPPA extended to 100 nm from then-applicable baselines and was only amended to a geographical extension of 200 nm in 2009.¹⁸⁸ This novel unilateral assertion of jurisdiction was undoubtedly inconsistent with then-existing international law but has to be understood in the context of the already described domestic and international perspective (e.g. domestic pressure, questions of national identity and sovereignty).¹⁸⁹ The Canadian Prime Minister at that time, Pierre Elliot Trudeau described the AWPPA as a Canadian exercise of desire to keep the Arctic pollution-free rather than an assertion of sovereignty.¹⁹⁰ This point of view is highly criticized by Griffiths describing the Canadian approach as primarily a means of defending sovereignty.¹⁹¹ The US and some European countries, alleging Canada to violate international law, immediately protested against the enacted legislation.¹⁹² The US was especially concerned that the Canadian action could be taken as precedent for other unilateral infringements of the freedom of the seas.¹⁹³

¹⁸⁵ McDorman 2009, p. 67

¹⁸⁶ Mills 1984, p. 24

¹⁸⁷ Act to Amend the Territorial Sea and Fishing Zones Act, S.C. 1969-1970, c. 68, sec. 1243. The territorial waters at the time of voyage were defined in the Territorial Sea and Fishing Zones Act, S.C. 1964-65, c. 22.

¹⁸⁸ Act to amend the Arctic Waters Pollution Prevention Act, S.C. 2009, c. 11

¹⁸⁹ McDorman 2009, p. 76

¹⁹⁰ International Legal Materials, American Society of International Law 1970b, p. 601

¹⁹¹ Griffiths 1976, p. 157

¹⁹² See, *inter alia* de Mestral/Legault 1979/1980, p. 50; McRae 2007, p. 9 and Byers/Lalonde 2009, p. 1150 and 1151. Being aware of the legal uncertainty of its legislation, Canada terminated its acceptance of the compulsory jurisdiction mechanism of the ICJ, providing that Canada could not be brought before the ICJ without its prior consent, see International Legal Materials, American Society of International Law 1970a, p. 598

¹⁹³ International Legal Materials, American Society of International Law 1970c, p. 605

Yet the dispute over the AWPPA receded with the inclusion of Article 234 in UNCLOS. In fact the Article legitimized the Canadian unilateral approach¹⁹⁴ and further permitted the extension of its application to the above-mentioned 200 nm limit.

The AWPPA and the Arctic Waters Pollution Prevention Regulations (AWPPR) respectively conferred on Canada the right to enforce pollution control regulations on ships passing through Canadian Arctic waters.¹⁹⁵ In particular it prohibits the deposit of any waste except permitted by regulations.¹⁹⁶ It further establishes CDEM standards and navigation standards that are more stringent than GAIRAS.¹⁹⁷ The owner of vessels and cargoes is required to provide evidence of financial responsibility (insurance, indemnity bond) and is liable for pollution caused damage.¹⁹⁸ With regard to Arctic shipping, the AWPPA and the Arctic Shipping Pollution Prevention Regulations (ASPPR), respectively provides for the prescription of shipping safety control zones.¹⁹⁹ Ships have to meet certain requirements relating to the design, construction, navigational safety and quantities of fuel and water on board, if they seek to operate in the specified waters.²⁰⁰

4.2. Northern Canada Vessel Traffic Service Zone Regulations (NORDREG)
Canada's NORDREG regulations²⁰¹ are a mandatory ship reporting system for Canada's Northern and Arctic Waters, promoting both safe and efficient navigation and the protection of the marine environment. It was introduced as a voluntary system in July 1977 to enhance safe movements of maritime transportation in Arctic waters and consequently safeguard the Arctic environment.²⁰² Enabled by the Canadian Shipping Act 2001,²⁰³ the Northern Canada Vessel Traffic Services Zone Regulations, making vessel reporting mandatory in Canadian Arctic Waters, came into force on 1 July 2010.²⁰⁴

¹⁹⁴ Molenaar 1998, p. 419

¹⁹⁵ Lalonde 2004, p. 61. The Arctic waters of the AWPPA consist of the internal waters, the territorial sea and the EEZ of Canada within the area enclosed by the 60th parallel of north latitude, the 141st meridian of west longitude and the outer limit of the exclusive economic zone, see AWPPA (R.S.C., 1985, c. A-12), § 2

¹⁹⁶ AWPPA (R.S.C., 1985, c. A-12), § 4

¹⁹⁷ Legal aspects of Arctic shipping. Summary report 2010, p. 14

¹⁹⁸ AWPPA (R.S.C., 1985, c. A-12), § 8

¹⁹⁹ AWPPA (R.S.C., 1985, c. A-12), § 11

²⁰⁰ AWPPA (R.S.C., 1985, c. A-12), § 12

²⁰¹ Northern Canada Vessel Traffic Services Zone Regulations (SOR/2010-127)

²⁰² Pharand 2007, p. 49

²⁰³ Canada Shipping Act, 2001 (S.C. 2001, c. 26), § 136

²⁰⁴ Northern Canada Vessel Traffic Services Zone Regulations (SOR/2010-127), c. 11 and Order Amending the Shipping Safety Control Zones Order (SOR/2010-131)

The regulations apply to vessels – domestic or foreign - of 300 gross tonnage or more, vessels engaged in towing or pushing another vessels (with a combined gross tonnage of 500 or more) and vessels carrying a pollutant or dangerous goods as cargo. For the purposes of the Canadian Shipping Act 2001, subsections 126 (1) and (3) stipulate that no vessel of the prescribed class shall enter, leave or proceed the zone without having previously obtained clearance. The regulations apply to all Canadian Arctic Waters and consequently cover internal waters, the territorial sea and the waters adjacent to the territorial sea (out to 200 nm).

Figure 3 illustrates the waters of the NORDREG Zone²⁰⁵:

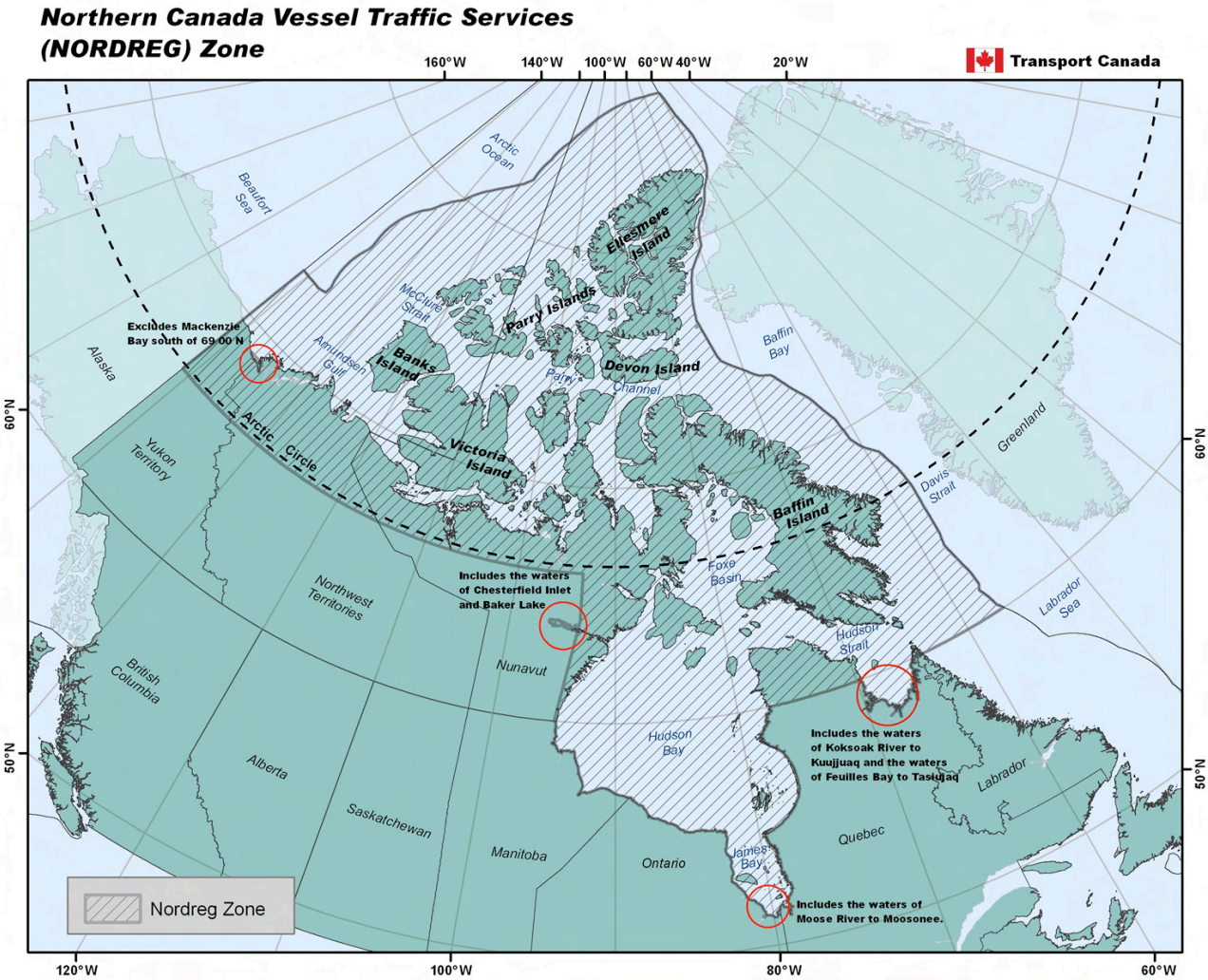


Figure 3 – Map of the NORDREG Zone

Source: Transport Canada, Northern Canada Vessel Traffic Services (NORDREG) <http://www.tc.gc.ca/media/documents/marinesafety/nordreg-en.pdf> Accessed 24 June 2011

²⁰⁵ The waters consists of those covered by the Shipping Safety Control Zones, see Shipping Safety Control Zones Order (C.R.C., c. 356) and additionally the waters of Ungava Bay, Hudson Bay and Kugmallit Bay that are not in a shipping safety control zone, the waters of James Bay, the waters of Koksoak River from Ungava Bay to Kuujuaq, the waters of Feuilles Bay from Ungava Bay to Tasiujaq, the waters of Chesterfield Inlet that are not within a shipping safety control zone and Baker Lake, and the waters of Moose River from James Bay to Moosonee.

4.2.1. Vessel Traffic Service (VTS): a definition

“Vessel Traffic Service” (VTS) is a term adopted by the IMO to describe a shore-based marine traffic monitoring system. The (revised) IMO Guidelines for Vessel Traffic Services, adopted by the IMO Assembly on 27 November 1997 as Resolution A.857(20) define a VTS as follows:

“*Vessel traffic service (VTS)* - a service implemented by a Competent Authority, designed improve the safety and efficiency of vessel traffic and to protect the environment. The service should have the capability to interact with the traffic and to respond to traffic situations developing in the VTS area.”²⁰⁶

Vessel traffic services were recognised by the revised SOLAS Chapter V on Safety of Navigation, regulation 12 (SOLAS 74, V/12), adopted in December 2000 and entered into force on 1 July 2002.²⁰⁷ The provision states that contracting governments may establish VTS by following the IMO Guidelines if the volume of traffic or the degree of risk justifies such services. Regulation 12 further stipulates that the use of VTS may only be mandatory in sea areas within the territorial sea.²⁰⁸ Neither the revised provision nor the Guidelines shall prejudice the legal regime of straits used for international navigation. The IMO Guidelines distinguish between a Port or Harbour VTS and a Coastal VTS. Port/Harbour VTS are mainly concerned with vessel traffic approaching to a port/harbour, while a Coastal VTS is concerned with the transit traffic passing through the specified VTS area. A coastal VTS system explicitly involves a two-way communication between the shore and the participating vessel.²⁰⁹

VTS shall allow the identification and monitoring of vessels and strategic planning of vessel movements. It can furthermore assist in prevention of pollution and co-ordination of pollution response.²¹⁰ Accordingly, a VTS can both contribute to maritime safety and environmental protection, indicating a primary and secondary regulatory response. The IMO Guidelines give additional guidance with regard to

²⁰⁶ IMO Guidelines for Vessel Traffic Services, adopted by IMO Assembly Resolution A.857(20), 27 November 1997, Chapter 1.1.1

²⁰⁷ IMO Report of the Maritime Safety Committee on its Seventy-Third Session, MSC 73/21/Add.2, 14 December 2000, Annex 7

²⁰⁸ Ibid.

²⁰⁹ Plant 1997, p. 20

²¹⁰ IMO Guidelines for Vessel Traffic Services, adopted by IMO Assembly Resolution A.857(20), 27 November 1997, Chapter 2.1.3

planning a VTS. Chapter 3.2.2 indicates several circumstances which could lead to VTS establishment, amongst others conflicting and complex navigation patterns, environmental considerations or difficult hydrographical and meteorological elements.²¹¹

VTS' are inextricably interlinked with other aspects of marine traffic management, e.g. traffic separation schemes and ship reporting systems (SRS) and frequently operate in conjunction.²¹² The general principles for SRS are outlined within IMO Resolution A.851(20)²¹³, which is associated with SOLAS 74, Regulation V/11 on *ship reporting systems*.²¹⁴

5. Chapter V – In the matter of Article 234 vs. NORDREG

5.1. The NORDREG debate at the IMO

Unaffected by an indicated high level of compliance²¹⁵ with the voluntary NORDREG system, several (Canadian) commentators regularly called for a mandatory nature of NORDREG,²¹⁶ in order to enhance the Canadian control over (foreign) vessels. Yet critical views expressed that a unilateral implementation could consequently lead to formal letters of protest from countries contesting the Canadian internal waters claim in the NWP.²¹⁷

NORDREG's mandatory nature was immediately contested both on a bilateral²¹⁸ and multilateral level. At the IMO's 56th session of the Maritime Safety Committee's (MSC) Sub-Committee on Safety of Navigation (NAV), the US delegation and the observer of the Baltic and International Maritime Council (BIMCO) raised critical questions with regard to the legal consistency of the NORDREG regulations under

²¹¹ IMO Guidelines for Vessel Traffic Services, adopted by IMO Assembly Resolution A.857(20), 27 November 1997, Chapter 3.2.2

²¹² Mapplebeck 2000, p. 136. For a critical review regarding the rapid growth of VTS and the linkage with SRS, see Hughes 2009

²¹³ IMO General Principles for Ship Reporting Systems and Ship Reporting Requirements, including Guidelines for Reporting Incidents involving Dangerous Goods, Harmful Substances and/or Marine Pollutants, adopted by IMO Assembly Resolution A.851(20), 27 November 1997, Chapter 1

²¹⁴ IMO Report of the Maritime Safety Committee on its Seventy-Third Session, MSC 73/21/Add.2, 14 December 2000, Annex 7

²¹⁵ Canadian Senate Standing Committee on Fisheries and Oceans 2009, p. 58

²¹⁶ See, *inter alia* Beaufort Sea Environmental Assessment Panel 1984, p. 97; Pharand 2007, p. 50 and Byers/Lalonde 2009, p. 1186

²¹⁷ Lackenbauer 2009, p. 34

²¹⁸ In a *Note Verbale* France urged Canada to present the regulations to the IMO for final approval, see French *Note Verbale* 2010

international law.²¹⁹ The US is reported to have said that the regulations were inconsistent with “key law of the sea principles related to the freedom of navigation, including the right of innocent passage and the right of transit passage through straits used for international navigation.”²²⁰ The statement reaffirms the US position on the legal status in the NWP, without explicitly mentioning the NWP. Both representatives acknowledged Canada’s policy to protect the Arctic marine environment but criticized the unilateral approach and wished for a prior evaluation and approval by the IMO.²²¹ Canada is reported to have answered that the regulations were consistent with international law, including Article 234 and SOLAS 74, regulations V/11 and V/12. Furthermore the regulations requirements were based on “accepted international guidelines for ship reporting systems”.²²²

Prior to the 88th session of the MSC, the US and the International Association of Independent Tanker Owners (INTERTANKO) submitted a joint document reaffirming concerns over the legal applicability of the NORDREG regulations with SOLAS 74, Chapter V but supporting Canada’s intention to provide for the safety of navigation and the protection of the Arctic marine environment.²²³ Yet the document substantiates the inconsistency of the regulations with SOLAS 74, regulations V/11 and V/12 and specifically notes a discrepancy between NORDREG’s proposed spatial scope of 200 nm and its applicability with SOLAS 74, regulation V/12.3, which indicates the use of a mandatory VTS only within the territorial sea of a coastal state.²²⁴

In its response, Canada reiterates its arguments by specifically outlining its rights and duties according to Article 234, which takes precedence over the territorial sea (12 nm) limitation²²⁵ and over SOLAS 74, regulations V/11 and V/12.²²⁶ According to the Canadian statement “Article 234 provides a complete legal justification in international law for NORDREG”.²²⁷ Canada holds the view that the NORDREG regulations are both a VTS and SRS, following the particular IMO Guideline, as well

²¹⁹ IMO Report to the Maritime Safety Committee, Sub-Committee on Safety of Navigation, NAV 56/20, 31 August 2010, paras. 19.21 and 19.23

²²⁰ Ibid., para. 19.21

²²¹ Ibid., paras. 19.21 and 19.23

²²² Ibid., para. 19.22

²²³ United States and INTERTANKO, Northern Canada Vessel Traffic Services Zone Regulations, MSC 88/11/2, 22 September 2010, para. 2

²²⁴ Ibid., para. 4

²²⁵ Canada, Comments on document MSC 88/11/2, MSC 88/11/3, 5 October 2010, para. 5.1

²²⁶ IMO Report of the Maritime Safety Committee on its Eighty-Eighth session, MSC 88/26, 15 December 2010, para. 11.34

²²⁷ Canada, Comments on document MSC 88/11/2, MSC 88/11/3, 5 October 2010, para. 5.1

as International Association of Marine Aids to Navigation and Lighthouse Authorities (IALA) Recommendations.²²⁸ As requested by the US and INTERTANKO²²⁹, Canada also submitted, as already announced at NAV's 56th session, information on NORDREG to the IMO for recognition under SOLAS 74, regulation V/11.4.²³⁰ Yet the US delegation made clear that such a submission for recognition is not an assessment by the IMO of the legitimacy of the system or the validity of its legal basis.²³¹ The Canadian call for recognition implicates the above-mentioned nexus between VTS and SRS and further includes a traffic organization service (TOS). The Canadian way of proceeding has to be defined as diplomatic courtesy. Regulation V/11.4 clearly stipulates that governments may submit regulations for recognition, indicating a right rather than an obligation.²³² Based on the assumed rights according to Article 234, which confirm the broad Canadian interpretation, the unilateral approach and a subsequent missing submission of information can be legally justified. Such an approach could further be regarded as an expression of political self-assertion based on legal confidence and classified in line with the "rocker of the boat" occasions.

The debate continued during the 88th session of the MSC with several delegations advancing their opinion. In particular the delegation of Germany and Singapore supported the Canadian intention to protect the Arctic environment but criticized the unilateral approach and emphasized the leading competence of the IMO.²³³ In its statement, Singapore clarified its position that any possible measure taken to enhance the navigational safety in the Arctic should not compromise the freedom of navigation and that any application of Article 234 should be done with "due regard to navigation".²³⁴ Yet the discussion saw delegations supporting the Canadian view considering the issue not within the remit of the IMO and other delegations

²²⁸ Canada, Comments on document MSC 88/11/2, MSC 88/11/3, 5 October 2010, paras. 5 and 6

²²⁹ United States and INTERTANKO, Northern Canada Vessel Traffic Services Zone Regulations, MSC 88/11/2, 22 September 2010, para. 10

²³⁰ Canada, Information on the Mandatory Canadian Ship Reporting System in Canada's Northern Waters (NORDREG), SN.1/Circ.291, 5 October 2010

²³¹ IMO Report of the Maritime Safety Committee on its Eighty-Eighth session, MSC 88/26, 15 December 2010, para. 11.38

²³² IMO Report of the Maritime Safety Committee on its Seventy-Third Session, MSC 73/21/Add.2, 14 December 2000, Annex 7

²³³ IMO Report of the Maritime Safety Committee on its Eighty-Eighth session, MSC 88/26, 15 December 2010, paras. 11.35 and 11.36

²³⁴ IMO Report of the Maritime Safety Committee on its Eighty-Eighth session, Annexes 2 to 33, MSC 88/26/Add.1, 19 January 2011, Annex 28, p. 1

supporting the perspective that for the adoption of mandatory SRS and the establishment of VTS the procedures within SOLAS should be followed.²³⁵

Additionally, the NAV subcommittee's chairman summarized that the documents provided to the NAV highlight an ongoing bilateral discussion.²³⁶ Considering the delineated debate within an international forum, it has to be noted though that the NORDREG argument was upgraded to a multilateral level.

Two pillars of argumentation summarize the NORDREG debate at the IMO and lead to the question if the NORDREG regulations are laws or regulation for the prevention, reduction and control of marine pollution from vessels and therefore consistent with international law, in particular Article 234. The Canadian view is based on the legal superiority of Article 234, taking precedence over SOLAS 74, chapter V. The opposite view, represented by the US, Germany and Singapore, states an inconsistency of the NORDREG regulations with SOLAS 74, regulations V/11 and V/12. Yet only Singapore reacted to the Canadian Article 234 argumentation.

5.2. Are the NORDREG regulations consistent under Article 234?

The missing reference in Article 234 for pre-approval by the "competent international organization" strengthens the interpretation of a greater unilateral coastal state jurisdiction over specific ice-covered areas. This unilateral right was evidently asserted in Canada's submission to the MSC.²³⁷ It contradicts the US assumption that any VTS, developed for utilization outside the territorial sea of a coastal state, needs prior evaluation and approval by the "competent international organization".²³⁸ The wording of Article 234 and the provided argumentation of interpretation in this respect, support the Canadian view of a unilateral approach. Yet the crucial point is the consideration of NORDREG as regulations specifically adopted for the prevention, reduction and control of marine pollution from vessels in ice-covered areas.

²³⁵ IMO Report of the Maritime Safety Committee on its Eighty-Eighth session, MSC 88/26, 15 December 2010, para. 11.37

²³⁶ Ibid, para. 11.39

²³⁷ Canada, Comments on document MSC 88/11/2, MSC 88/11/3, 5 October 2010, para. 5.1

²³⁸ An explicit US reaction with regard to the legal interaction between NORDREG and Article 234 cannot be noticed by the IMO documents provided. Yet it can be argued that according to the US, Article 234 does not allow coastal states to adopt regulations, e.g. NORDREG and consequently does not provide a justification for not processing through the IMO.

Yet again the either narrow or broad interpretation of the term “where”, as outlined in Chapter 3.3, has to be considered the essential starting point of argumentation. Article 234 stipulates that coastal states have the right to adopt laws and regulations to protect the fragile Arctic environment, covering both a primary purpose (environmental protection) and a secondary purpose (maritime safety). Based on the outlined interpretation the term “where” either indicates a spatial or a temporal meaning. As the Canadian Arctic Archipelago is undoubtedly an area where severe climatic conditions and the presence of ice coverage occur, the NORDREG regulations, presumably adopted to advance navigation in this region, cover the purpose of Article 234 to protect the fragile environment. This broad interpretation indicates that as long as a regulation is useful to protect the concerned environment, its adoption under Article 234 is legally justified.

The narrow interpretation dictates that any law or regulation based on Article 234 is only permitted where and when necessary. It implies that the NORDREG regulations were implemented based on the inevitable assumption that the regulations are not only useful, but also necessary to protect the Canadian Arctic environment. The regulations have to have a clear and distinct purpose, comparably to an economic cost-benefit analysis. Do the legal “costs” of implementation, e.g. unilateral approach in a plural defined area, benefit the envisaged outcome? It seems evident that any government invoking Article 234 would prefer the broad interpretation. Based on the indicated high level of compliance with the voluntary NORDREG system, the illustrated possible impacts of navigational accidents to the Arctic environment and NORDREG’s purpose to secure safe shipping and enhance the protection of the marine environment, it seems arguable that the NORDREG regulations are regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas, even when considering a narrower interpretation.

Another controversial point of discussion derives from the term “due regard to navigation”. In its statement to the MSC, Singapore questions the compatibility of NORDREG’s requirement to obtain prior clearance and the “due regard to navigation” clause in Article 234.²³⁹ Canada considers this condition fully consistent with the stipulated obligation in Article 234 to protect and preserve the marine environment, as it ensures a vessel to be capable to navigate through the hazardous

²³⁹ IMO Report of the Maritime Safety Committee on its Eighty-Eighth session, Annexes 2 to 33, MSC 88/26/Add.1, 19 January 2011, Annex 28, p. 1

Arctic waters.²⁴⁰ Consequently implemented, the clearance requirement implicates the Canadian possibility to prohibit entrance in the NORDREG zone if a vessel does not comply with the imposed prerequisite. The above outlined *sui generis* interpretation of Article 234, giving a relatively greater weight to environmental considerations, fits NORDREG's purpose and could as a matter of fact cover the full spatial territorial scope of 200 nm. In its submission to the MSC, Canada notes that the clearance and reporting requirements are not inconsistent with the obligation to give due regard to navigation, evident from the high level of compliance with the voluntary NORDREG system.²⁴¹

The Article's *sui generis* connotation of its term "due regard to navigation" clearly indicates a legal compatibility of the NORDREG regulations based on Article 234 to that regard. Canada's approach to establish a system based on the predefined IMO Guidelines and its later submission to the IMO for recognition under SOLAS 74, regulation V/11.4, contradict the perception of an entirely unilateral policy. The legal justification based on Article 234 can be considered rather unique; the line of action *per se* can to a certain extent be described as unilateralism mixed with multilateral flavour.

Despite the *sui generis* characterization of "due regard to navigation", the coastal states' regulations have to be based upon adequate scientific knowledge. The dynamic characterization of science being in constant evolution²⁴² and the coherent development of scientific knowledge imply the ability to improve and strengthen current laws and regulations. As already pointed out, a contemporary understanding of the provision, given the dynamics of the term "based on the best available scientific evidence", does not require any regulation, based on Article 234, to be bound to the CDEM character of the AWPPA, which gave rise to the provision. Hence including an implicit implementation of a precautionary approach and the changing, dynamic nature of the Canadian Arctic Archipelago, it must be assumed that NORDREG can be considered a regulation to protect the Arctic environment, comprising the "due regard to navigation" clause.

None of the state parties involved in the discussion have yet mentioned NORDREG's ramification to the controversial status of the NWP. However, the US is

²⁴⁰ IMO Report of the Maritime Safety Committee on its eighty-eighth session, Annexes 2 to 33, MSC 88/26/Add.1, 19 January 2011, Annex 27, p. 2. Yet Canada does not respond directly to the statement made by Singapore.

²⁴¹ Canada, Comments on document MSC 88/11/2, MSC 88/11/3, 5 October 2010, para. 5.2

²⁴² Bartenstein 2011, p. 40

reported to have said that the regulations are inconsistent with transit passage through international straits²⁴³, which implicitly reaffirms the country's position with regard to the NWP. The continuing debate about the mandatory nature of NORDREG could evolve into a high-level, multilateral discussion regarding the legal status of the passage. It can be argued that the acceptance and further application of the mandatory NORDREG status could strengthen the Canadian position concerning its internal waters claim. Consequently, Canada would be entitled to exercise full sovereignty in its internal waters, without the duty to permit entry of foreign vessels into its ports with the exception of distress or *force majeure*.

PART II

6. Chapter VI – unilateral approach or bi-/multilateral solution?

The aim of the following chapter is to comment on the political reasoning of the involved states with regard to their NORDREG related argumentation. It will further consider the question if the current disputed legal status of the NWP under international law lead to additional problems with regard to the NORDREG regulations. As already mentioned in Chapter 2.5 the Arctic is commonly visualized as an area of either conflict or cooperation with a common tendency by academic commentators, politicians and the popular press/mass media to oversimplify uncertain political, legal and economic processes. In this context it seems essential to note that the Arctic region is not an area of conflict *per se*, especially if compared to other regions of the world. The absence of an overarching legal treaty for the Arctic is often referred to as one component of the conflict argumentation.²⁴⁴ Yet the international legal framework of UNCLOS and associated legally binding instruments inevitable cover the Arctic Ocean as well. Arctic states have cooperated extensively since the early 1990s, with the Arctic Environmental Protection Strategy (AEPS) being adopted in 1991 and the AEPS' absorption into the Arctic Council in 1996. The intergovernmental forum of the Arctic Council has the possibility to influence the actions of its member states and enhance Arctic cooperation based on multilateral guidelines. The Ilulissat Declaration, adopted by the five Arctic coastal states, yet containing an agreed rejection regarding the development of a comprehensive legal

²⁴³ IMO Report to the Maritime Safety Committee, Sub-Committee on Safety of Navigation, NAV 56/20, 31 August 2010, para. 19.21

²⁴⁴ However, Young holds the opinion that "such an instrument could end up doing more harm than good." See Young 2009, p. 441

regime to govern the Arctic Ocean, represents the willingness of the concerned states to cooperate with each other and other interested parties.²⁴⁵

The above outlined complex legal situation regarding NORDREG, its relationship with Article 234 and the controversial status of the NWP, are based on certain political approaches. The NORDREG discussion is encircled by the collision of two distinctly different orientations, where the responsibilities of a coastal state collide with the necessities of maritime states. Whereas Canada regards its Arctic region as a regional issue with special characteristics and the interest to attain almost exclusive control over its offshore areas, the US is concerned with global economic and military considerations and the maintenance of the freedom of navigation.²⁴⁶ From the Canadian perspective both the NWP and the present NORDREG discussion comprise a distinct sovereign element. McDorman describes the Canadian NWP approach as encapsulated within a “politics of sovereignty”.²⁴⁷ McRae summarizes Arctic sovereignty as a touchstone in the Canadian political debate with the inherent fear of losing national heritage in the north.²⁴⁸ Consequently, any debate regarding the northern area and its international legal status clearly features a distinct domestic element. The Canadian Arctic approach is delineated in the Canadian Northern Strategy and builds on four pillars: exercising the full extent of sovereignty, sovereign rights and jurisdiction; promoting economic and social development; protecting Canadian environmental heritage; and improving and devolving northern governance.²⁴⁹ The future challenges of the Arctic are supposed to be faced by Arctic cooperation – bilateral relations with the Arctic neighbours and multilateral collaboration through the regional mechanism of the Arctic Council and other institutions – with the US being considered the premium partner in the Arctic.²⁵⁰ Irrespectively of this generally drafted strategy, Canada’s NORDREG approach and the related Canadian Arctic internal waters claim reveals *prima facie* two policy options: the continuation of its unilateral assertion, based on rather strong legal arguments in the particular case of NORDREG and partially in the NWP status debate, or an enhanced commitment to multilateral solutions. Yet Canada has not

²⁴⁵ For an comprehensive analysis regarding the possibilities of future Arctic governance, see, *inter alia* Young 2009; Koivurova/Molenaar 2009 and Koivurova 2008

²⁴⁶ McDorman 2009, p. 225. The US defines the freedom of seas in its Arctic Regional Policy as “top national priority”, see United States, The White House 2009. As described above other maritime states are conformably interested in the maintenance of the freedom of navigation.

²⁴⁷ McDorman 2010, p. 242

²⁴⁸ McRae 2007, p. 1

²⁴⁹ Statement on Canada’s Arctic Foreign Policy 2009, p. 3

²⁵⁰ *Ibid.*, p. 23

undertaken any aggressive actions to support its unilateral assertions as these could impede Canada's position if other states, in particular the US, ignore the imposed requirements by Canada.²⁵¹ Multilateral cooperation, on the other hand, could ensure that internationally accepted standards conform with the desired Canadian regulations for Arctic waters.²⁵²

However, the NORDREG debate at the IMO uncovered a third interrelated option, being in line with the "rocker of the boat" occasions, of a legally strong, unilateral starting position, embedded in a multilateral discussion within an international forum. Two main conclusions can be drawn from the current debate. First, the dispute regarding NORDREG demonstrated an international coverage with several states being actively involved. Considering a bigger picture and including the argumentation regarding the NWP' legal status, the debate is rather a multilateral one than solely a bilateral one between Canada and the US.²⁵³ This first implication evidently leads to the second conclusion and Canada being rather surprised by the intensity of the debate at NAV and MSC. Although NORDREG is based on strong legal arguments, Canada's submission for recognition strengthens the view that various disagreements with NORDREG took Canada by surprise. Arctic shipping is considered to be a matter of global concern. Canada's unilateral approach, evidently hampering navigational rights in this area, could intensify international pressure on Canada and lead to further implications in the context of the NWP.

The debate at the IMO was exclusively related to the consistency of the regulation itself with SOLAS 74 and with Article 234, respectively, and not to the NWP, its possible status as an international strait and its applicability with Article 234. The US is only reported to have said that NORDREG is hampering the right of transit passage through straits used for international navigation. However, the US remained silent on the relationship between transit passage and Article 234. Canada on the other hand did not rely on its internal waters claim during the NORDREG debate. Furthermore the regulations are carefully drafted, avoiding any nexus between NORDREG itself and the NWP. Based on these observations it can currently be concluded that the dispute regarding the legal status of the NWP does not explicitly influence the NORDREG debate, with both actors keeping the NWP dispute on a

²⁵¹ McDorman 2009, p. 227

²⁵² McRae 2007, p. 21.

²⁵³ Considering additionally the fact that the 1988 "agreement to disagree" between Canada and the US does not apply to any other state.

lower level. Yet the mandatory nature of NORDREG and its consequent IMO debate transformed the issue to a multilateral level, with possible disadvantageous implications for Canada with regard to its claims in the Canadian Arctic Archipelago and the NWP, respectively.

Both the debate regarding the legal compatibility of NORDREG with Article 234 and the legal status of the NWP determine an essential component of the future Canadian Arctic policy. Will shipping in Canadian Arctic waters be regulated in accordance with self-determined rules and regulations or will Canada have to comply with GAIRAS and be conceivably limited by them? Could Canada influence GAIRAS to a self-determined extent? Based on a possible internationalization of the NWP, Canada will have to deal with vessels seeking to navigate through the NWP without complying with the NORDREG regulations. Consequently, Canada would have to enforce its self-imposed legal power and arrest concerned vessels. Is the Arctic state able to accept this legal challenge?

During the Cold War period, the US provided almost exclusively for North American Arctic security against the Soviet Union by simultaneously being sensitive about the Canadian concerns of sovereignty,²⁵⁴ with the exceptions of the various examples mentioned above. This backup-policy allowed Canada “to free-ride on the Americans’ willingness to act”.²⁵⁵ The US itself seems to be limited in its Arctic policy approach. On the one hand, the freedom of navigation has been a cornerstone of US foreign policy and its specific oceans interests, deeply embedded in the US conscience.²⁵⁶ Agreeing to the Canadian NWP claim could set precedence, possibly encouraging other coastal states bordering an international strait.²⁵⁷ On the other hand, an aggressive approach regarding the international strait agenda would seem inconsistent with the US policy of enhanced North American Arctic security.²⁵⁸ Yet the US Deputy Secretary of State James Steinberg indicated, that “security was not a dominant concern” with regard to the US Arctic policy.²⁵⁹ According to Huebert the actions taken by the US during the last 20 years imply a stronger US concern about the principle of freedom of navigation through international straits than any security

²⁵⁴ Huebert 2008, p. 15 and 16

²⁵⁵ Ibid., p. 16

²⁵⁶ Kraska 2007, p. 270

²⁵⁷ Lalonde 2008, p. 11

²⁵⁸ McDorman 2009, p. 227. Consequently, international strait considered NWP would be open and accessible for all ships (commercial or military), regardless the flag the concerned ship flies.

²⁵⁹ Doyle 2009

benefits achieved through a Canadian regulated NWP.²⁶⁰ The US updated its Arctic Region Policy on 9 January 2009 by identifying seven areas of US interest and procedural steps to implement the policy: interests of national and homeland security, international governance, extended continental shelf and boundary issues, international scientific cooperation, maritime transportation, economic and energy issues, environmental protection and the conservation of the living resources.²⁶¹ The presidential directive urges the US Senate to accede to UNCLOS in order to protect US interests with respect to the Arctic.

In their detailed analysis, comparing the national strategies of the five Arctic coastal states, Brosnan, Leschine and Miles conclude that an Arctic Ocean conflict is not inevitable as numerous avenues for cooperation occur.²⁶² Both Canada and the US have their distinct political considerations and approaches. It seems obvious that the lesser attention given to the legal status of the NWP, the better for the Canadian position. A low-level profile with regard to the dispute is supposed to be envisaged. Yet the debate at the IMO regarding the mandatory nature of the NORDREG regulations seems to be self-defeating with regard to the Canadian position. A direct confrontation between the two North American allies, e.g. tied by the North Atlantic Treaty Organisation (NATO) or the North American Aerospace Defense Command (NORAD), is highly unlikely, with both the NORDREG and NWP discussion remaining a political and diplomatic controversy. Yet as the debate has shown, it comprises rather a multilateral than bilateral element, with other states influencing the point of discussion. With regard to Canada the influence of domestic politics and the internally sensitive notion of Arctic sovereignty has to be considered a decisive feature of Canadian Arctic policy. The mandatory nature of NORDREG as an internal imperative is only one piece in the Canadian puzzle of Arctic sovereignty. Issues of sovereignty and the alleged “race” for hydrocarbon and natural resources have influenced the policy of all five Arctic coastal states. Canada, as indicated in this thesis, is not an exception.

The Canadian NORDREG approach and its “positive” unilateral example of applying Article 234 could encourage other Arctic coastal states, with the exception of the US and its prominent flag state interests, to flex their “Article 234 muscle” and adopt similar laws and regulations to prevent environmental pollution in the Arctic region.

²⁶⁰ Huebert 2003, p. 306

²⁶¹ United States, The White House 2009

²⁶² Brosnan/Leschine/ Miles 2011, p. 203

Consequently, this possibility could strengthen the collaboration of the five coastal states and lead to an exclusive “Arctic-5-club”.²⁶³

7. Chapter VII - Conclusions

The thesis aimed to discuss the following three research questions: i) are the NORDREG regulations consistent with UNCLOS, Article 234, ii) does the disputed legal status of the NWP under international law lead to further problems with regard to the NORDREG regulations and iii) what is the political reasoning of the involved states arguing concerning a legal or non-legal applicability of the regulations with Article 234.

According to the provided research it has to be concluded that Canada’s legal argumentation with regard to the applicability of the NORDREG regulations with Article 234 is solid and its application legally justified. Yet a broader or narrower interpretation of the Article influences the applicability to a certain extent. So far Article 234 has only been implemented by Canada and the Russian Federation with a broad interpretation of the Article. Comparing the academic literature it has to be noted that the interpretation of Article 234 and its legal purpose is mainly of Canadian commentator’s concern with a rather weak opposed point of view by other observers. This observation implicitly indicates the importance of Article 234 for the Canadian rationale and was likewise noticed with regard to the legal status of the NWP.

The legal status of the NWP is a matter of national importance for Canada and its notion of sovereignty. NORDREG was especially implemented to enhance the security of navigation in the Canadian Arctic waters and consequently to protect the fragile Arctic environment. Yet the sovereignty issue constantly “joins the game”. Until now the international debate regarding the legal status of the NWP does not influence the application of NORDREG and its discussion or *vice versa*. NORDREG is carefully drafted, avoiding any nexus between the regulation itself and the status of the NWP. As a matter of fact, NORDREG requires clearance prior to the entry of the NORDREG Zone and not prior to the entry of the NWP.

It was concluded that Article 234 is applicable to straits used for international navigation and could therefore still be implemented, even if the NWP would be considered an international strait. Hence the relating navigational rights under the international straits regime would not circumscribe the coastal states rights under

²⁶³ “Arctic-4-club” if considering the US position.

Article 234 with regard to the protection of the marine environment.²⁶⁴ Referring to the 2nd research question an opposite effect could occur, where the NORDREG discussions influence the NWP argumentations. Broad international compliance with the NORDREG regulations could evidently strengthen Canada's position with regard to the legal status of the NWP. Yet the risk of a lower level of compliance, compared to the voluntary NORDREG system, could have a reverse effect.

Canada, the US and other maritime states pursue distinct political goals. Both the Canadian and the US argumentation are reasoned by these considerations and illustrate the discrepancy between the notions of a coastal state and a maritime state. The vital importance of the North for the Canadian self-conception decisively influences the Canadian approach and its policy to protect the Arctic environment. Despite this assessment of political reality the country's environmental effort should not be denied.

²⁶⁴ As outlined in Chapter 3.3.3 the applicability of Article 234 in straits used for international navigation depends on the used interpretation of Article 234 itself. If the powers, conferred on coastal states by Article 234, are more stringent and far reaching than those of Part III, an application of Article 234 to international straits seems to be legally reasonable.

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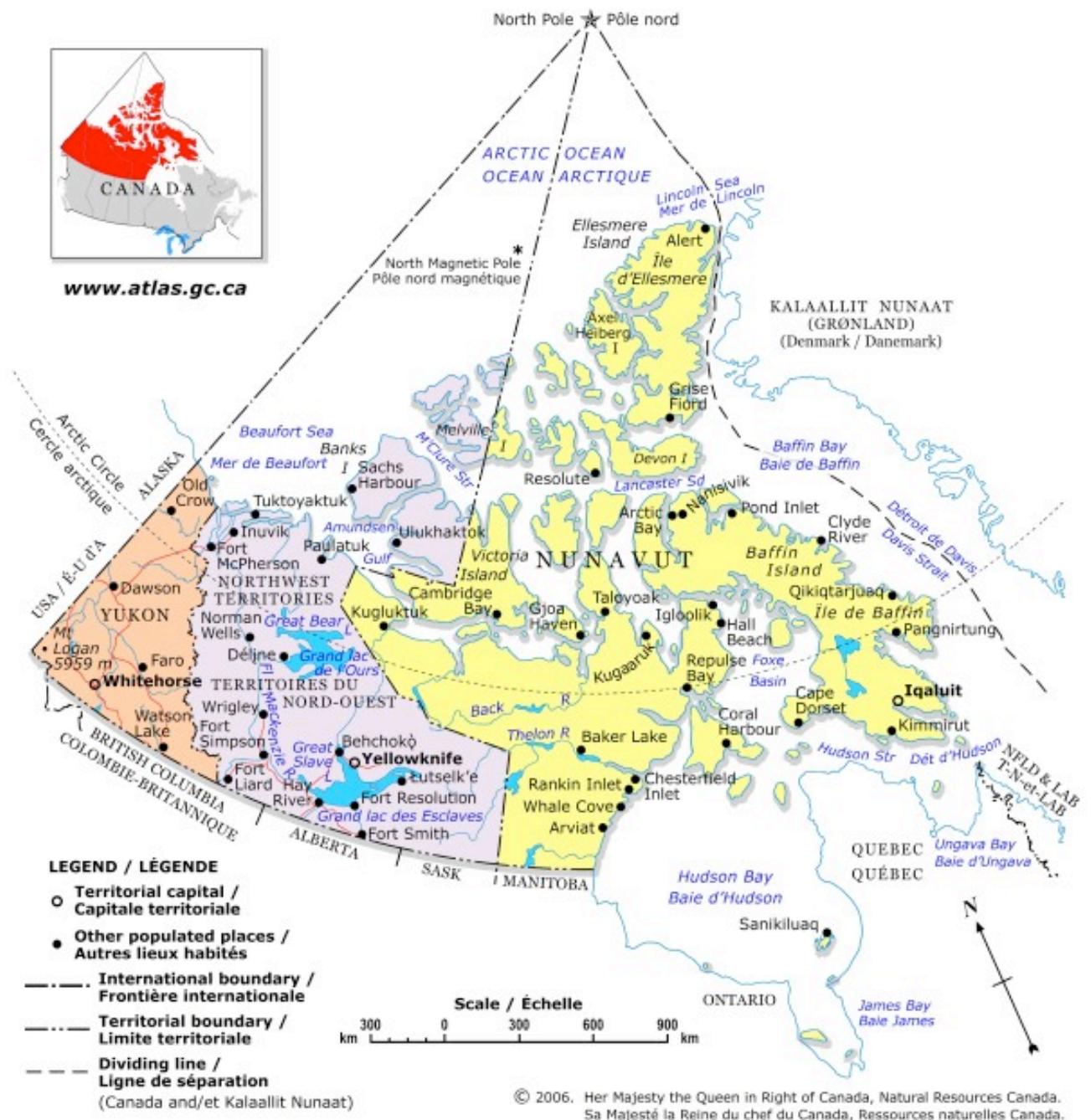
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9. Annexes

Annex1



Annex1: The Territories

Source: Natural Resources Canada

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